> Assets Class are being distributed – there is nothing equitable about an allocation methodology that provides the "relatively few needy survivors" in the United States "with a disproportionate benefit solely because of the overall size of the survivor community in the United States. *Id* at 109.

In re Holocaust Victim Assets Litig., 424 F.3d at 148-49 (2nd Cir 2005), *rehearing and rehearing en banc denied* (January 3, 2006). (App. A 28-29; App. I).

II

Almost seven years after the fairness hearings which took place in Brooklyn on November 29, 1999 and in Jerusalem on December 14, 1999, and after the distribution of more than $875 million to almost 400,000 persons around the world, including more than $190 million to persons residing in the United States (See Appendix M to the brief in opposition), petitioner argues that the members of the settlement classes should not have been asked to decide whether to opt out before knowing precisely how much each would receive under the allocation plan, and that multiple separate counsel were required for each of the five settlement classes (and, presumably, for each of the five victim groups – Jews, Jehovah's Witness, Sinti-Roma, gays and the disabled), and even, as this petition makes clear, each of the five geographical residence areas (Israel, United States, former Soviet Union, Europe, and the rest of the world) – a potential total of 125 separate counsel).

As a procedural matter, the structural challenges are barred by settled doctrines of preclusion and laches. Mr. Dubbin, counsel for HSF and counsel of record herein, raised the issues that he seeks to raise herein in two appeals to the

Second Circuit in 2000, only to withdraw both appeals in May, 2001. (See Appendix J). Moreover, in July, 2001, a parallel appeal raising similar procedural issues was prosecuted by members of the class represented by court-appointed counsel. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001) (Appendix D). The Second Circuit upheld the District Court's allocation formula, and the decision to dedicate looted assets funds under the *cy pres* doctrine for the relief of the poorest Holocaust survivors. *Id.* No appeal was taken from the Circuit's 2001 decision, which, in conjunction with the withdrawal of Mr. Dubbin's appeals, definitively resolved all procedural challenges to the Swiss bank settlement. *Federated Dep't Stores, Inc. v. Motie*, 452 U.S. 394 (1981).

Most importantly, the Second Circuit looked closely into HSF's claims that the District Court had imposed a "flawed judicial process." Judge Cabranes, writing for a unanimous panel, stated:

> The HSF's appellate brief averts to the "District Court's 'flawed judicial process,' referring principally to (1) the District Court's approval of the Settlement Agreement before adopting a plan for distributing and allocating settlement funds; and (2) alleged "assurances by the Lead Settlement Counsel and the court that the initial allocation imbalance would be rectified with subsequent distributions of larger amounts" for the benefit of survivors residing in the United States. Appellants' Br. at 26. The HSF characterizes these purported procedural irregularities as "examples" by which this Court's "examination" of the merits of this appeal would be "informed." *Id* at 17, 20.

> *Upon carefully reviewing the record of this case, we find no evidence whatsoever of a 'flawed judicial process.' To the contrary, the careful consideration that the District Court, the Special Master, and the Lead Settlement Counsel have accorded to every step in the allocation and distribution of this historic settlement has been exemplary.*

424 F3d at 149, n.15 (emphasis added) (App. A 30).

COUNTER-STATEMENT OF THE CASE:

AN OVERVIEW OF THE IMPLEMENTATION OF THE SWISS BANK HOLOCAUST SETTLEMENT

Petitioner's counsel paint a myopic and inaccurate picture of the implementation of the Swiss bank settlement, claiming that it has been unfair to Holocaust survivors residing in the United States. [2]

In fact, the extraordinarily successful implementation of the Swiss bank settlement has treated Holocaust survivors

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[2] The nature of the Swiss bank settlement is discussed in *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(upholding fairness of settlement)(App B). The secondary literature describing the settlement is substantial. Eg. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICAN COURTS (2003); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 Wash. U. L. Q. 795 (2002). The most complete description of the litigation occurs in the magisterial two volume report of the Special Master supporting his recommended plan of allocation. The report was before the Court below. JA 2053-2577; 5698. It is available on line at www.swissbankclaims.com.

throughout the world with scrupulous equality and fairness in distributing, to date, more than $875 million to approximately 400,000 persons, including more than $190 million to persons residing in the United States. *Letter, dated April 24, 2006, from Special Master to District Court Summarizing Current Distributions from Settlement Fund*)(App M). To date, approximately 29% of the settlement funds have been distributed to persons residing in the United States, even though only 14%-19% of the survivor population resides in the United States.[3] *Id.* Indeed, the only segment of the Swiss settlement funds that has not been disproportionately distributed to persons residing in the United States is the $205 million set aside for the relief of the poorest survivors – precisely because the bulk of the poorest survivors do not live in the richest country on earth, but are

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[3] The information on demographics and relative need before the District Court was drawn primarily from Andrew Hahn et al., *Jewish Elderly Nazi Victims: A Synthesis of Comparative Information on Hardship and Need in the United States, Israel, and the Former Soviet Union* (2004) (a Report prepared for the Joint Distribution Committee by researchers from Brandeis University), *available at* http://www.cmjs.org/files/JDCBrandeisReport01-26-04Final.pdf). As Chief Judge Korman noted in his March 9, 2004 opinion rejecting HSF's proposed formula, the best available demographic information places 14%-19% of Holocaust survivors in the United States, and 19%-27% in the former Soviet Union. Demographic studies indicate that the number of Holocaust survivors requiring assistance with basic necessities of life such as food, fuel in winter and warm blankets is far higher in the former Soviet Union, reaching a minimum of 135,000 identified persons; while the incidence of comparable need in the United States is far lower, numbering less than 5,000. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, *reh'g denied*, 311 F. Supp. 363 (EDNY 2004)(explaining basis for denial of HSF objections)(App G), cited with approval in *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 144-145 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (Jan. 3, 2006) (upholding District Court's *cy pres* allocation formula)(App A) (opinion); (App I) (denial of rehearing).

disproportionately clustered in the economic ruins of the former Soviet Union.[4]

The Swiss bank settlement, signed on January 26, 1999, calls for the payment of $1.25 billion by two Swiss banks – UBS and Credit Suisse – in return for the release of most Swiss entities (except all but two Swiss insurance companies) from claims by Holocaust victims arising out of the WW II behavior of Swiss entities.

The settlement agreement provides relief to the members of five victim groups – Jews, Jehovah's Witnesses, Sinti-Roma, gays and the disabled – who bore the brunt of Nazi persecution.[5] The agreement provides for payments to members of the five victim groups in connection with five violations of law: (1) failure to return "deposited assets" placed in Swiss banks for safekeeping; (2) forced labor for German companies in settings assisted by Swiss banks; (3) forced labor for Swiss companies; (4) exclusion from, or mistreatment in, Switzerland on grounds of religion or ethnic status; and (5) knowing "fencing" by Swiss entities of assets looted by Nazis.[6]

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[4] To date, 41% of distributions to the Deposited Assets class; 23% of the distributions to the Slave labor I class; and 41% of the distributions to the Refugee class have gone to persons residing in the United States. (App. M).

[5] The Second Circuit has affirmed the decision to limit participation in the settlement classes to members of the five victim groups. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2nd Cir. 2000).

[6] The discrete violations of law are reflected in the membership of the five settlement classes: (1) the Deposited Assets class is made up of members of the five victim groups seeking the return of funds deposited in Swiss banks on the eve of the Holocaust; (2) the Slave Labor I class is made up of members of the five victim groups who performed slave labor for German companies receiving financial assistance from Swiss banks;

The settlement agreement did not seek to allocate the $1.25 billion settlement fund among the five settlement classes; among the five victims groups; or among the five geographical areas – Israel, the United States, the former Soviet Union, Europe and the rest of the world - within which the victims reside. Instead, the District Court adopted a scrupulously fair two-step procedure that, first, determined whether the $1.25 billion settlement was fair; and, second, asked the members of the settlement classes to pre-commit to the outcome of a fair process for allocating and distributing the settlement funds. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000)(App B). Class-members who were unwilling to pre-commit to the results of the fair allocation procedures were offered the opportunity to opt out. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Class members who failed to opt out, but who objected to the outcome of the allocation process, were assured judicial review of the lawfulness of any allocation.

The scrupulously fair allocation process consisted of a neutral court-appointed Special Master with a duty to develop a proposed plan of allocation and distribution after broad consultation with any member of the settlement classes who wished to be heard, either with or without counsel; and a financially unconflicted[7] Lead Settlement Counsel, one of

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(3) the Slave Labor II class is made up of persons who performed slave labor for Swiss-owned companies; (4) the Refugee class is made up of members of the five victim groups who were excluded from, or were abused in, Switzerland during WW II because of race, religion or ethnicity; and (5) the Looted Assets class is made up of members of the five victim groups who suffered looting at the hands of the Nazis *and* whose assets were improperly "fenced" by Swiss entities.

[7] Lead Settlement Counsel was financially unconflicted within the meaning of *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), first,

whose principal duties was to assure unfettered access to the Special Master for all class members wishing to communicate with him concerning the allocation of the settlement proceeds. *Id.*

Once a proposed plan of allocation was developed, the Special Master was to notify the members of the settlement classes of the plan's content, and present the plan to the Court for its consideration. The Court was to hold a hearing on the proposed plan, and put the plan into effect only if it appeared fair and just.

The settlement classes overwhelmingly approved the pre-commitment strategy, returning more than 564,000 questionnaires expressing a willingness to participate in the allocation process. After two fairness hearings, Chief Judge Korman explicitly accepted the settlement as fair, including the pre-commitment strategy. *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (EDNY 2000) (App B).

After 18 months of intense communication with class members, the Special Master proposed a plan of allocation in September, 2000. See *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at www.swissbankclaims.com). After notice to the class, and a full day of hearings before the District Court, Chief Judge Korman approved the proposed allocation plan on November 22, 2000. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY Nov. 22, 2000)(App C), aff'd 413 F.3d 183 (2d Cir. 2001)(App. D).

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because he had no economic interest in the approval of the settlement since he had waived attorneys' fees for helping to achieve it; and, second, because his hourly lodestar compensation as Lead Settlement Counsel was completely independent of any particular allocation.

The plan of allocation adopted by the District Court recognized that the claim for the return of Swiss bank accounts was the legal heart of the case. Accordingly, based on information revealed in an audit of Swiss banks conducted by Paul Volcker which had been made public on December 8, 1999, the District Court accepted the recommendation that up to $800 million be allocated to the Deposited Assets class, and established an elaborate claims procedure headquartered in Zurich to adjudicate the many thousands of claims for Swiss bank accounts that resulted from the publication, pursuant to the settlement agreement, of information concerning 21,000 (subsequently increased to 24,000) "probable or possible" Holocaust victim-owned Swiss accounts. *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2nd Cir 2001) (upholding allocation of up to $800 million to deposited assets class) (App. D). To date, approximately $375 million has been distributed to owners of WW II Swiss bank accounts. (App M). It currently appears that the claims procedure will be successful in distributing much, if not all, of the $800 million to owners of WW II accounts.[8]

The District Court also accepted the Special Master's recommendation that each survivor forced to work in a slave labor camp for German or Swiss companies receive $1,000 (in addition to the $7,500 awarded by the German Holocaust Foundation: Remembrance, Responsibility and the Future).[9]

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[8] Petitioner's assertion at p.12 of the *Petition* that the *cy pres* fund will grow to between $500-$600 million is wildly overblown. In fact, it appears that once the deposited assets claims process is completed, little or no residual funds will remain to supplement the existing *cy pres* fund.

[9] Lead Settlement Counsel serves as one of the two United States representatives on the Board of Trustees of the German Holocaust Foundation, permitting a degree of coordination between the two funds which occasionally overlap in providing benefits to slave laborers. The

The $1,000 figure was subsequently raised to $1,450 as a result of interest earned on the settlement funds during the period of administration, and as a result of Congress's exemption of the settlement fund's earnings and distributions from federal income taxation. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000)(adopting proposed allocation plan)(App. C). See Sec. 803, *H.R. Conf. Rep.* 1836 (2001). Slave laborers have received approximately $275 million, to date.[10] (App M).

Finally, the District Court accepted the Special Master's recommendation that $100 million (subsequently increased to $205 million as the result of tax exempt interest earned on the settlement fund) be allocated to the Looted Assets class, both because of the relatively weak legal underpinnings of the class's legal claims against Swiss entities, and because of the virtual impossibility of individualized administration of a looted assets claims program. See *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000)(allocating $100 million to looted assets class for *cy pres* relief of poorest Holocaust survivors))(App C); *In re Holocaust Victim Assets Litig.*, CV 96-4849 (ERK)(MDG) (unreported)(September 25, 2002) (applying allocation formula to $45 million in interest earned on the settlement fund)(App. E); *In re Holocaust Victim Assets Litig.*, 96 CV 4849 (ERK)(MDG), 2003 U.S. Dist. LEXIS 20686 (EDNY November 17, 2003)(rejecting HSF challenge to allocation

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combined resources of the Swiss Bank Holocaust settlement and the German Holocaust Foundation approximate $7 billion. See *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

[10] The District Court approved, as well, payments to persons who were excluded from, or mistreated in, Switzerland during WW II because of race or religion ranging from $725 to $3,625, depending upon the severity of the conduct. *Id.* To date, approximately $11 million has been distributed to the so-called "refugee class." (App M).

formula and applying formula to $60 million in interest earned on settlement fund).

Four of the five settlement classes were provided with a carefully designed claims process. Claims for Swiss bank accounts were and are adjudicated by a Claims Resolution Tribunal (CRT II) in Zurich initially headed by Paul Volcker in his capacity as a Special Master reporting directly to the Court. Slave labor claims by Jewish claimants were and are processed by the Conference on Jewish Material Claims Against Germany (the "Claims Conference"), headquartered in New York City. Slave labor claims by non-Jewish claimants (Sinti-Roma, Jehovah's Witnesses, gays and the disabled)) were and are processed by the International Organization on Migration (IOM) headquartered in Geneva.

The claims programs in connection with the Deposited Assets, Slave Labor I, Slave Labor II, and Refugee classes have been remarkably successful, enabling the Swiss bank settlement to have distributed more than $660 million, to date, (exclusive of the $205 million distributed or firmly allocated to social agencies by the Looted Assets class, and the $10 million to the Victims' List Foundation) on the basis of individualized consideration of eligibility – an astonishing achievement given the 60 years that have elapsed since WW II, and the wholesale destruction of bank records by the Swiss banks.[11] (App M).

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[11] The approximate distribution figures as of April 24, 2006 are: Deposited Assets - $375 million; Slave Labor I and II - $275 million; Refugee - $11 million; Looted Assets - $205 million; and Victims' List Foundation/Yad Vashem and the United States Holocaust Memorial Museum - $10 million to establish a definitive list of Holocaust victims. (App M).

One class defied individualized administration. The Special Master reported to the Court in September, 2000 that it would be impossible to determine which items of Nazi loot had been knowingly "fenced" by Swiss entities, and which had been disposed of through German or other entities, rendering it impossible to engage in an individualized Looted Assets claims process. See *Special Master's Proposed Plan of Allocation and Distribution* (September 11, 2000)(available on line at www.swissbankclaims.com). Accordingly, the Special Master urged the Court to consider *cy pres* distribution of the looted assets funds for the relief of the poorest Holocaust survivors throughout the world. *Id.* The District Court adopted the recommendation. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (adopting allocation formula) (App. C). The Second Circuit affirmed. 413 F.3d 183 (2nd Cir. 2001)(App D).

The Special Master engaged in an intensive investigation, with the active cooperation of class members and demographic experts, in an effort to determine the whereabouts of the poorest Holocaust survivors in the greatest need.[12] Pursuant to the investigation, 10% of the looted assets fund (or $20.5 million) was allocated for relief of impoverished non-Jewish survivors residing in Eastern Europe under the auspices of the IOM. The remaining 90% (or $184.5 million) was allocated for the relief of impoverished Jewish survivors residing throughout the world. Based on exhaustive studies of the geographical distribution of the poorest Jewish survivors, the Special Master recommended – and the District Court approved - a distribution of 75% of the Jewish *cy pres* funds to the Joint Distribution Committee's *Chesed* program for the relief of

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[12] See n. 3. *supra.*

135,000 identifiable Holocaust victims living in utter destitution in the former Soviet Union. The remaining Jewish *cy pres* funds were allocated on the basis of the number of similarly destitute persons requiring immediate assistance with the basic necessities of life residing in each country: 12.5% to Israel; 4% to the United States; 4% to Eastern Europe; 3% to Western Europe; and 1% to the rest of the world. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (EDNY November 22, 2000) (adopting allocation formula) (App. C).

Samuel Dubbin, counsel of record for petitioners herein, acting on behalf of the individuals who eventually formed HSF and who appear as petitioners herein, challenged the Jewish *cy pres* allocation formula, claiming that it short-changed survivors residing the United States. On September 8, 2000, Mr. Dubbin filed an appeal from the District Court's fairness order, which had been entered on August 9, 2000. On December 21, 2000, Mr. Dubbin filed an appeal from the District Court's allocation order which had been entered on November 22, 2000. However, on May 15, 2001, confronted with a Second Circuit order directing him to file his brief and appendix by May 15, 2001, or suffer the dismissal of his appeals, Mr. Dubbin moved for leave to withdraw both appeals. On May 30, 2001, leave to withdraw both appeals was granted and the appeals were dismissed. (App J).

On July 26, 2001, in a parallel appeal prosecuted by other class members with the assistance of court-appointed counsel, the Second Circuit explicitly affirmed the Special Master's plan of allocation among the classes, including the decision to allocate up to $800 million to the deposited assets class, and the decision to utilize the *cy pres* doctrine to permit distribution of funds allocated to the looted assets class for the relief of the poorest survivors. *In re Holocaust Victim*

Assets Litig., 413 F.3d 183 (2d Cir. 2001) (App D). No appeal was taken from the Second Circuit's decision.

Finally, on September 9, 2005, the Second Circuit unanimously upheld the District Court's decision to allocate the looted assets Jewish *cy pres* funds on the basis of worldwide need, not national population quotas, and characterized the administration of the Swiss bank settlement as "exemplary." *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2nd Cir. 2005). (App.A). On January 3, 2006, the Second Circuit, without dissent, denied petitioner's application for re-hearing and re-hearing *en banc*. (App I). This petition followed.

REASONS FOR DENYING THE WRIT

Petitioner's narrow quarrel with the District Court's Jewish *cy pres* allocation formula does not present an inter-Circuit conflict, and does not raise significant and recurring issues of law warranting review by this Court. Indeed, the unique nature of the Swiss Bank Holocaust settlement, involving, as it does, five worldwide settlement classes receiving compensation for unique events transpiring in Europe more than 60 years ago, coupled with: (1) the unusually intense judicial supervision of the settlement's administration provided by Chief Judge Korman; (2) the role of the United States in helping to broker the settlement; (3) the undeniable success of the settlement in distributing more than $875 million to almost 400,000 persons to date; and (4) and the Second Circuit's characterization of the settlement's administration as "exemplary," renders this proceeding an unusually poor candidate for certiorari.

I.

No Legal or Equitable Basis Exists to Question the *Cy Pres* Allocation Formula Recommended by the Special Master, Adopted by the District Court, and Unanimously Affirmed by the Second Circuit

Petitioner "G.K." claims that the District Court's formula, which allocates funds for the relief of the poorest survivors of the Holocaust solely on the basis of relative individual need without regard to national residence, results in too much assistance being provided to 135,000 identifiable destitute Holocaust survivors residing in the former Soviet Union, and not enough to less needy survivors residing in the United States. "G.K." demands an allocation formula keyed to national residence, insisting that limited funds devoted to the relief of the poorest Holocaust survivors throughout the world be initially allocated *per capita* on the basis of the total number of Holocaust survivors residing in each country (whether or not they are needy); and only then be distributed to the poorest survivors residing in each country.

Not surprisingly, given the avowedly parochial nature of HSF as an organization devoted to advancing the interests of Holocaust survivors residing in the United States, such a formula is tailor-made to benefit survivors residing in the United States, which has between 14%-19% of the survivor population,[13] but which has a much lower proportion of survivors in great need.

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[13] Petitioner's unsupported assertion that 30% of all Holocaust survivors currently reside in the United States is incorrect. In fact, demographic studies conducted under the auspices of Brandeis University reveal that between 14%-19% of the Holocaust survivor population resides in the United States. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d 89, 97 (EDNY 2004)(App. G 13).

In support of such an inequitable allocation formula, petitioner offers several wholly unpersuasive arguments.[14] First, petitioner argues that the District Court's decision to allocate *cy pres* funds on the basis of worldwide individual need, not national population quotas, violates the principle of intra-class equity because it results in the distribution of most of the *cy pres* funds for the relief of 135,000 destitute residents of the former Soviet Union, and only a relatively small amount of the funds to those survivors residing in the United States manifesting a roughly comparable level of need. But, as the Second Circuit noted, such an argument rests on the question-begging assumption that Holocaust survivors residing in the United States enjoy a baseline group entitlement to a *per capita* allocation of the *cy pres* looted assets funds, regardless of economic need. *In re Holocaust Victim Assets Litig.*, 424 F.3d at 148-49 (2nd Cir. 2005), *rehearing and rehearing en banc denied* (January 3, 2006)(App A 28).

In fact, there are no presumptive national shares, just as there are no presumptive shares payable to any group of

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[14] Petitioner's purported legal authority for the proposition that the District Court was legally obliged to adopt HSF's inequitable allocation formula is completely irrelevant. Not a single case cited by petitioner involves the *cy pres* allocation of funds to the neediest members of a class. See 424 F.3d at 147-48. (App. A26-27). It is, of course, true that in the absence of a valid *cy pres* decision to confine distribution of a class's assets to the neediest members of the class, it would be improper to distribute assets on the basis of need rather than legal entitlement. That is why deposited assets, slave labor and refugee distributions are calculated without regard to need. But where, as with the looted assets class, a valid and unchallenged decision has been made to devote class assets to the relief of the poorest members of the class, petitioner's authority for allocating funds on the basis of raw population is simply beside the point.

victims.[15] Membership in the settlement classes is not a group phenomenon, but a consequence of the shared individual experience of having been both the target of Nazi lunatics, and the victims of Swiss duplicity. The District Court's *cy pres* allocation formula – a formula that ignores national residence and targets relative individual need on a worldwide basis - treats all survivors equally as individuals, and awards *cy pres* funds only to those extremely poor survivors who meet the principled criteria of great need. To argue, as does petitioner, that such a result is "unequal" because it results in most of the *cy pres* money being spent on the poorest survivors, who happen to reside in the former Soviet Union, is to misunderstand the very idea of equality. The essence of equality is to treat like persons alike, and different persons differently. The District Court's allocation formula achieves precisely that result by applying a principled test that identifies the survivors in greatest need wherever they may live, and deploys the *cy pres* funds for their relief. In fact, as the Second Circuit noted, it is the HSF formula that would violate the equality principle by providing the United States survivor community with an unfair windfall. *In re Holocaust Victim Assets Litig.*, 424 F.3d at 148-49 (2nd Cir 2005), *rehearing and rehearing en banc denied* (January 3, 2006). (App. A 28-29; App. I).

Petitioner argues that in describing the factors that have led to the desperately impoverished condition of Holocaust survivors residing in the former Soviet Union, the District

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[15] Similar efforts to assert group-based entitlements to a share of the Swiss bank settlement have been rejected by the District Court and affirmed by the Second Circuit. See *In re Holocaust Victim Assets Litig.*, 424 F.3d 159 (2nd Cir. 2005)(upholding refusal to allocate *cy pres* funds to gay community); *In re Holocaust Victim Assets Litig.*, 424 F.3d 169 (2nd Cir. 2005)(upholding refusal to allocate *cy pres* funds to the disabled community).

Court adopted extraneous allocation criteria having nothing to do with the survivors' underlying legal claims. See *In re Holocaust Victim Assets Litig.*, 302 F. Supp.2d at 144-45; 147, *reh'g denied*, 311 F. Supp. 363 (EDNY 2004)(App G) (explaining basis for denial of HSF objections). But petitioner misunderstands the purpose of the District Court's recitation of the factors leading to the currently desperate condition of Holocaust survivors in the former Soviet Union. The District Court's recitation of the history and current causes of the plight of destitute Holocaust survivors residing in the former Soviet Union was descriptive, not allocative. The sole allocation criteria used by the District Court was relative current need – a criteria that cannot be measured, described or explained without reference to history (especially the inability to have provided reparations to survivors trapped behind the Iron Curtain, the collapse of the Soviet economy, and the exodus of much of the Soviet Jewish community), as well as reference to currently available alternative sources of assistance.

Petitioner also argues that the District Court's allocation formula results in an unlawful failure to provide most members of the looted assets class with any tangible benefit in return for their release of their looted assets claims. It is unclear, however, why the vast bulk of United States survivors would be better off under HSF's formula than under the District Court's formula. In both settings, once a valid *cy pres* decision is made to devote looted assets funds to the relief of the poorest survivors – a decision that HSF does not challenge - the vast bulk of the looted assets class will, of necessity, receive nothing tangible, except the psychic satisfaction of assisting the poorest survivors. Why the psychic satisfaction of survivors residing in the United States would be enhanced by a formula that unfairly reduces the ability to aid destitute survivors residing in the former Soviet Union, while unfairly increasing the ability to aid less

needy survivors residing in the United States, is a secret known only to the leadership of HSF.

Finally, petitioner argues that the District Court's allocation formula does not provide a benefit to the looted assets class as a whole, but privileges a segment of the class. But, once again, it is unclear why the HSF formula would benefit a broader segment of the class. Under both the HSF formula and the formula adopted by the District Court, tangible benefits will flow to only a small proportion of the looted assets class – the portion in greatest need. Indeed, once the judgment was made to devote the looted assets funds to the relief of the poorest survivors – a judgment that HSF does not challenge - it became inevitable that most members of the looted assets class as a whole would not receive tangible benefits from the fund. To be sure, the entire class does receive a psychic benefit from the principled use of the fund to relieve the distress of the poorest members of the class. But why that psychic benefit is dependent on unfairly privileging survivors residing in a survivor's country of residence at the expense of poorer survivors residing elsewhere, is another mystery known only to the leadership of HSF.

In short, the legal Rubicon was crossed when all agreed that, pursuant to the *cy pres* doctrine, looted assets funds should be dedicated to the relief of the poorest survivors. At that point, no individual looted assets class member could be said to have retained a legally cognizable individual interest in a *pro rata* share of the looted assets funds. Instead, the class members were entitled to the principled application of an allocation formula designed to identify those members of the class most in need. That is exactly what they have received.

II. No Legal or Equitable Basis Exists to Question the Meticulously Fair Procedures Utilized by the District Court That Have Been Praised as "Exemplary" By the Second Circuit

A. The Petition is Barred by Direct Estoppel and Laches

Petitioner, seeking to pose a belated, jurisdictionally-deficient and wholly unpersuasive challenge to the structure of the Swiss bank settlement, appears to argue that (1) multiple separate counsel were required for each interest group in connection with the allocation process; (2) the opt out process should have been deferred until the completion of the allocation proceedings; and (3) Lead Settlement Counsel failed in his duty of loyalty owed to survivors residing in the United States because he supported the District Court's allocation formula.

Such a belated effort – fully seven years into the settlement's administration - to question the basic structure of the Swiss bank settlement is clearly barred by principles of direct estoppel, issue preclusion and laches. Most directly, Mr. Dubbin, counsel of record herein, acting on behalf of the persons who formed HSF and who are pursuing this appeal, raised the procedural concerns in connection with two appeals in September and December, 2000, from the District Court's August 9, 2000 fairness order, and from the District Court's November, 22, 2000 order adopting the Special Master's proposed plan of allocation and distribution (including the very *cy pres* allocation formula he seeks to challenge in this proceeding), only to withdraw both appeals on May 15, 2001, the date his appendix and appellate briefs were due in the Second Circuit. (App J). Accordingly, this proceeding is precluded. *Federated Dep't Stores, Inc. v.*

Motie, 452 U.S. 394 (1981); *Montana v. United States*, 440 U.S. 147 (1979).[16]

In *Federated Dep't Stores*, one of several plaintiffs failed to pursue an appeal to the Ninth Circuit from the dismissal of their anti-trust complaint. When the Ninth Circuit reversed the District Court and ordered reinstatement of the complaint, the non-appealing party sought reinstatement, as well. This Court ruled that having failed to pursue an appeal, the non-appealing party was precluded from continuing to seek relief. In this case, the predecessors and founders of HSF formally withdrew their appeals raising the issues they seek to raise in this petition. (App J). Accordingly, HSF and its members and founders – all represented by Samuel Dubbin – are precluded under *Federated Dep't Stores* from challenging the structure of the Swiss bank settlement fully five years after they abandoned prior appeals raising the issue.

Even in the absence of direct estoppel, petitioner's challenge to the basic structure of the Swiss bank settlement is unquestionably barred by laches. In the five years since Mr. Dubbin abandoned his appeals in 2001, the Swiss bank settlement has distributed more than $875 million to approximately 400,000 persons. (App M). Although petitioner claims that this challenge is narrowly directed at the *cy pres* administration of the looted assets class,

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[16] The abandoned appeal from the fairness order was pursued in the name of Dr. Thomas Weiss, a founder of HSF, and a permanent member of its Board of Directors. The abandoned appeal from the District Court's allocation order was pursued on behalf of a number of HSF's founders, who also appear as petitioners herein. Mr. Dubbin was counsel in both abandoned appeals, as well serving as counsel of record in this proceeding. Under *Montana v. United States*, 440 U.S. 147 (1979), direct estoppel applies to HSF and its privies. (App. J).

petitioner's claim of structural insufficiency and constitutional inadequacy would, if upheld, erode the structural foundation of the entire settlement, leaving legal chaos in its wake, and causing untold harm to the members of the other four settlement classes. It would be inconceivable to permit a member of a class to abandon a timely appeal challenging the structural integrity of a complex settlement, and to wait five years until most of the funds have been disbursed before seeking to raise the identical issues in a new appeal.

B. The Procedures are Scrupulously Fair

Petitioner's argument on the merits is equally deficient. The insistence that Lead Settlement Counsel betrayed survivors residing in the United States because he defended the District Court's allocation formula is incomprehensible. The limited funds available for the relief of the poorest survivors did not begin to provide for the legitimate needs of poor survivors throughout the world. Like an inadequate blanket on a winter's night, shifting the limited funds to one set of survivors meant removing support from another set of deserving survivors. As the extraordinary opinion of the District Court demonstrates (App G), the allocation decision – described by the District Court as an "odious" responsibility – was the basis of sustained and principled investigation.[17] Lead Settlement Counsel exercised independent judgment and determined that the allocation formula proposed by the District Court was both equitable and well within its discretionary authority. Accordingly, Lead Settlement Counsel supported it. Why it was the duty of Lead Settlement Counsel to support an inequitable allocation

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[17] See n.3 *supra*.

formula that unfairly privileged survivors residing in the United States (who enjoyed separate legal representation) at the expense of destitute survivors residing in the former Soviet Union (who were otherwise unrepresented by counsel) is yet another mystery known only to the leadership of HSF.

Finally, petitioner's belated insistence that under *Amchem Products v.* Windsor, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), multiple separate counsel were required for each settlement class, and the right to opt out should have been deferred until each class member knew the outcome of the allocation process, would have doomed the Swiss bank settlement to certain failure. A settlement agreement involving five victim groups, five settlement classes, and five areas of residence could not possibly assign separate adversarial counsel for each interested group. To have done so would have been economically wasteful, requiring the payment of multiple attorneys' fees from the settlement fund.[18] More importantly, it would have been socially ruinous, pitting the elements of the Holocaust survivor community against each other in a series of adversary exchanges that would have embittered the lives of elderly survivors. Indeed, the divisive activity of HSF in pitting Holocaust survivors against each other is merely an example of the divisiveness that would have been unleashed by turning multiple entrepreneurial lawyers loose in a setting where their fees turned on shifting portions of the settlement fund to their clients at the expense of other Holocaust survivors.

Instead, the District Court adopted a procedure pursuant to which a neutral Special Master was directed to develop a

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[18] Attorneys' fees, to date, have been limited to approximately $7 million for obtaining a $1.25 billion settlement

proposed plan of allocation after intense collaboration with every segment of the survivor community, aided by a Lead Settlement Counsel free from any financial conflict of interest. 105 F. Supp. 2d 139 (EDNY 2000) (App. B). Most importantly, any class member dissatisfied with the proposed fair allocation procedure was offered the opportunity to opt out in order to pursue an individual claim. *Id.* Given the unique circumstances of this historic settlement, the District Court's thoughtful design of a scrupulously fair allocation proceeding that was not calculated to tear the Holocaust survivor community apart was clearly consistent with the Due Process clause. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Finally, petitioner's insistence that an absolute Due Process right exists to delay the decision whether to opt out until the completion of the allocation process is untenable under the unique circumstances of the Swiss bank settlement. Given the complexity of the settlement and the fact that the events underlying the claims took place more than 60 years ago, it would have been wholly impracticable to defer resolution of the basic fairness of the settlement until the completion of an allocation process that is still underway six years after the fairness hearing. Instead, unlike *Ortiz v. Fireboard Corp.*, 527 U.S. 815 (1999), which failed to provide for any opt out at all, the District Court's carefully designed fairness opinion offered class members a perfectly lawful choice between committing to a scrupulously fair allocation process, or opting out and pursuing an individual claim. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

In effect, petitioner argues that the Due Process clause guaranties segments of the class the right to exert pressure on the fair allocation process under threat of mass opt out. While such a right to engage in pressure tactics may be attractive to HSF, a well-funded lobby working on behalf of a single

group of survivors, it would have been unfair to the many survivors around the world who lack the resources to pressure the allocation process. Moreover, if survivors in the United States were entitled to threaten mass opt outs in order to pressure the allocation process, every other group of survivors was entitled to threaten a similar mass opt out, dooming the settlement. The pre-commitment alternative posited by the District Court assured the class an orderly method of allocating the settlement under scrupulously fair procedures, while offering a right to opt out to any member of the class unwilling to commit to such a fair allocation process.

III. The Troubling Entrepreneurial Nature of This Petition

The driving force behind this petition is a lawyer residing in Miami, Florida, Samuel Dubbin, who played no role in achieving this historic settlement, but who has repeatedly sought to enrich himself at the expense of the settlement fund.[19]

Mr. Dubbin's initial foray was as counsel to Dr. Thomas Weiss, a founder of HSF and a permanent member of its Board of Directors. Mr. Dubbin, acting on behalf of Dr. Weiss, initially challenged the fairness of the settlement in November, 1999. When the District Court approved the settlement as fair on August 9, 2000, Dr. Weiss and Mr. Dubbin asked to meet with the District Court to discuss a proposed appeal from the fairness order. Chief Judge Korman has described the meeting with Dr. Weiss and Mr. Dubbin:

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[19] The facts surrounding Mr. Dubbin's prior activities in this case are set forth in *In re Holocaust Victim Assets Litig.*, 424 F.3d 150 (2nd Cir 2005)(upholding denial of fees for Mr. Dubbin) (annexed to this brief in opposition as Appendix L).

> After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me *to provide attorneys' fees* and funds for private research that would assist him in his litigation against [the Italian insurance firm] Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to Holocaust survivors.

In re Holocaust Victim Assets Litig., 311 F. Supp.2d 363, 375 (EDNY 2004)(App K)(emphasis added). See also 424 F.3d at 154. (App L).

Mr. Dubbin then filed a notice of appeal from the fairness order that effectively prevented distributions from the settlement fund for six months. When neither the District Court nor Lead Settlement Counsel would succumb to such pressure tactics, Mr. Dubbin finally withdrew his appeals in May, 2001 without ever filing a brief or appendix.[20] (App. J).

Mr. Dubbin then re-appeared as the author of a grotesque fee application seeking a total of $5.9 million - $3.6 million

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[20] Mr. Dubbin flagrantly misrepresents the withdrawal of his appeals in May, 2001, mischaracterizing the withdrawals as *quid pro quos* for an alleged promise by the District Court and by Lead Settlement Counsel to provide additional funds to survivors in the United States, even though he was explicitly and repeatedly informed by Judge Korman and by Lead Settlement Counsel no such promise existed. 302 F. Supp.2d at 119-120 (App G50-G54). The Second Circuit's reference to "exemplary" conduct by Lead Settlement Counsel was in response to Mr. Dubbin's repeated public mischaracterizations of the circumstances surrounding the withdrawal of his appeals. 424 F.3d at 149, n. 15. (App. A 30).

for himself, and $2.3 for Dr. Weiss. 424 F.3d at 155. (App L). Dr. Weiss eventually obtained new counsel and withdrew his request; but Mr. Dubbin insisted on being paid $600,000 (subsequently reduced to $309,000) for his alleged services to the class in connection with insurance releases. Mr. Dubbin also sought $3 million for his activities challenging the *cy pres* allocation formula. Judge Korman denied the fee application in its entirety, characterizing Mr. Dubbin's work as "worthless." *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 363 (EDNY 2004) (App K). The Second Circuit affirmed. 424 F.2d 150 (2nd Cir. 2005) (App. L).

This petition is Mr. Dubbin's last chance to extract an attorneys' fee from the Swiss bank settlement fund. Having persuaded a few elderly Holocaust survivors residing in South Florida that they were treated unfairly by the District Court's painful decision to allocate the bulk of the *cy pres* funds to destitute survivors residing in the former Soviet Union, Mr. Dubbin seeks to topple the District Court's allocation formula in order to enable him to revive his $3 million fee application for "improving" the allocation formula.[21]

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[21] Mr. Dubbin complains that Lead Settlement Counsel, after waiving all attorneys' fees for having played a major role in achieving the $1.25 billion settlement, has requested discounted hourly lodestar fees for more than 8,000 hours of service to the settlement classes over the past seven years involving 29 separate legal proceedings, the renegotiation of crucial aspects of the settlement agreement, and the exemption of the settlement's earnings and distribution from federal income taxation. Mr. Dubbin suggests that Lead Settlement Counsel's support of the District Court's allocation formula was motivated by a desire to curry favor with Chief Judge Korman in order to obtain higher fees. *Petition*, p. 28, n 17. In view of Lead Settlement Counsel's 10 years of faithful service to Holocaust victims, the innuendo is beneath contempt. In order to assure absolute propriety in connection with the pending fee application, Chief Judge Korman has referred the matter to another judge.

Conclusion

For the above-stated reasons, the petition for certiorari should be denied.

Respectfully submitted

Burt Neuborne
40 Washington Square South
New York, New York 10012
Lead Settlement Counsel
(212) 998-6172

APPENDICES J, K, L, M

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 00-9217(L), 00-9614(Con)
MOTION INFORMATION FORM

In Re: Holocaust Victims

THOMAS WEISS,

Plaintiff-Appellant,

—v.—

UNION BANK OF SWITZERLAND, ET AL

Defendants-Appellees.

Movant:

	Yes	No
Consent sought from adversary(ies)?	☐	☐
Consent obtained from adversary(ies)?	☐	☐
Is oral argument desired?	☐	☐

ORDER

IT IS HEREBY ORDERED that the motion for withdrawal of appeals be and it *hereby* is granted.

FOR THE COURT,
Roseann B. Mackechnie,
Clerk

ANA VARGAS
By: Ana Vargas
Calendar Deputy Clerk

J-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 00-9217 (L) and 00-9614 (Consolidated)

IN RE: HOLOCAUST VICTIMS
ASSET LITIGATION

THOMAS WEISS,

Plaintiff/Appellant,

—v.—

UNION BANK OF SWITZERLAND ET. AL.,

Defendants/Appellees.

AFFIDAVIT OF SAMUEL J. DUBBIN

Before me, the undersigned authority, personally appeared Samuel J. Dubbin, who being first duly sworn deposes and says:

1. My name is Samuel J. Dubbin. I am the President of Samuel J. Dubbin, P.A., partner in the law fug of Dubbin & Kravetz, LLP. My firm represents Thomas Weiss, M.D. Appellant in the appeals styled *Weiss v. Union Bank of Switzerland*, Docket No. 00-9217 (Fairness Appeal), and Docket No. 00-9614 (Allocation Appeal),

and Appellants L Joseph Sachs and David Mermelste individually and on behalf of the Coalition of South Florida Holocaust Survivors Clubs; Leon Stabinsky, individually and on behalf of the California Association ofRolocaust Child Survivors; Leo Rechter, individually and on behalf of the National Association ofJewish Child Holocaust Survivors, Case No. 99-9614 (Allocation Appeal). This Affidavit is submitted in support of Appellants' Motion for Withdrawal of these appeals.

2. Upon consideration, the Appellants have determined to withdraw these appeals.

3. The undersigned has conferred with Burt Neuborne, Esquire, Lead Plaintiffs Settlement Counsel in the matter below and in these appeals. He has agreed that this withdrawal should be without assessment of costs.

FURTHER AFFIANT SAYETH NOT.

M

SAMUEL J. DUBBIN

Sworn to and subscribed to before me this 15th day of May, 2001.

Notary Public, At Large

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Affidavit of Samuel J. Dubbin was mailed this 15th day of May, 2001, to the attorneys on the attached service list.

SAMUEL J. DUBBIN
Samuel J. Dubbin, P.A.

Appendix K

UNITED STATES DISTRICT COURT
E.D. NEW YORK

Nos. CV-96-4849(ERK)(MDG),
CV-99-5161, CV-97-461

March 31, 2004

IN RE HOLOCAUST VICTIM
ASSETS LITIGATION

Burt Neuborne, New York University Law School, New York City, *lead class counsel.*

Robert A. Swift, Kohn, Swift & Graft, P.C., Philadelphia, PA, *one of plaintiffs' class counsel.*

Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL, *for Holocaust Survivors Foundation-USA, Inc.*

William Schwartz, Cadwalader, Wickersham & Taft LLP, New York City, *for Dr. Thomas Weiss.*

Roger M. Witten and Christopher P. Simkins, Wilmer Cutler Pickering, LLP, Washington, DC, *for defendants Credit Suisse and Union Bank of Switzerland.*

MEMORANDUM & ORDER

KORMAN, *Chief Judge*.

I write here to address the outstanding counsel fee request of Samuel J. Dubbin in connection with the settlement of this class action. The background of this case is set forth in *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y. 2000), and prior discussion of counsel fee requests can be found at *In re Holocaust Victim Assets Litigation*, 270 F.Supp.2d 313 (E.D.N.Y.2002), and *In re Holocaust Victim Assets Litigation*, 302 F.Supp.2d 89 (E.D.N.Y.2004). In a memorandum and order dated March 9, 2004, I explained the scope of the fee application at issue here as follows:

> Two years ago, Mr. Dubbin submitted a fee application that was almost equal to the total amount of legal fees awarded to those counsel who were compensated for their role in obtaining the $1.25 billion settlement with the Swiss banks. Specifically, Mr. Dubbin requested $3.6 million in fees and compensation for himself and an additional award of $2,315,250 for [his then client,] Dr. Thomas Weiss, a founding member of [Holocaust Survivor Foundation–USA]. Mr. Dubbin also sought expenses in the amount of $70,260.87. Of the total $5.9 million that Mr. Dubbin seeks, approximately $3 million is for his efforts on behalf of HSF–USA and its predecessor, the South Florida Holocaust Survivors Coalition, with respect to his objective described in the earlier parts of [my March 9, 2004] opinion—namely, his effort to rectify the allegedly disproportionate sum allocated to survivors in the United States. The remaining $2.9 million, of which Mr. Dubbin seeks [approximately] $600,000 for himself

> and $2.3 million for Dr. Weiss, who was Mr. Dubbin's client, is for services rendered in connection with Dr. Weiss's objection to the releases granted to Swiss insurance carriers as part of the global settlement of all claims against Swiss business entities.

In re Holocaust Victim Assets Litigation, at 116–117 (citations omitted). The figures are now substantially diminished. In my March 9, 2004 decision, I explained my reasons for rejecting the various objections filed by Mr. Dubbin on behalf of Holocaust Survivors Foundation–USA, Inc., (HSF–USA), and I denied outright Mr. Dubbin's fee request as it pertained to allocation issues in this case. *See id.* Shortly thereafter, Dr. Weiss, who has retained new counsel, withdrew in its entirety the $2.3 million fee request that Mr. Dubbin had filed on his behalf. *See* Letter from William Schwartz to Judge Korman, dated March 25, 2004 ("This is to confirm that my client, Dr. Thomas Weiss, has directed me to withdraw his application or petition for compensation in this matter."). Then, as I prepared to issue this opinion, Mr. Dubbin himself sought a reduction in his fee request. *See* Modified Fee Request of Dubbin & Kravetz, LLP, dated March 31, 2004 (hereafter "Modified Fee Request").

Mr. Dubbin continues to seek fees for work performed with respect to the litigation releases provided to Swiss insurance companies in the course of this case. Until today, Mr. Dubbin demanded a lodestar amount of approximately $550,000 in legal fees with an enhancement, and $95,000 in expenses. *See* E-mail from Samuel Dubbin to Burt Neuborne, dated June 14, 2003. Now he requests $309,051 plus expenses of $41,318. *See* Modified Fee Request, at 3. Because of the late timing of his modification, this opinion is written largely in reference to the original numbers. My analysis applies equally to Mr. Dubbin's modified request. Mr. Dubbin claims that

his request is modest in light of the significant time and research that he contributed to the debate over how to treat Swiss insurance companies under the settlement. To the contrary, as I suggested in my opinion of March 9, 2004, *see In re Holocaust Victim Assets Litigation*, at 117–118, the original request was grotesque, and even the modification reflects delusion. Consequently, I now deny outright the remainder of Mr. Dubbin's fee application.

Mr. Dubbin's fee request is based on an extraordinarily inflated view of the importance of his contribution to the resolution of this case. In his original fee application, Mr. Dubbin wrote: "Counsel's clients' objections led to the preservation of the world-wide class of Holocaust Survivors' claims against Swiss insurers, with a minimum value of $100 million." Verified Motion for Attorneys' Fees and Expenses, filed March 15, 2002, at 1 (hereafter "Fees Motion"). Notwithstanding this accomplishment, which is alleged to justify the fee request at issue here, Mr. Dubbin filed a notice of appeal on behalf of Dr. Weiss in an unsuccessful attempt to extort a significant cash award from the settlement fund. As I will explain, I rejected that attempt and I reject Mr. Dubbin's fee application. Before addressing in detail his fee request, I explain what actually took place leading to "the preservation of the world-wide class of Holocaust Survivors' claims against Swiss insurers." When viewed against this background, the absurdity of Mr. Dubbin's fee application becomes apparent.

Background

In 1998, I participated in the negotiations that led to the Settlement Agreement in this case, and I am aware that both sides were committed to achieving a global set-

tlement that was fair and complete. The primary focus was on defining the five principal classes of plaintiffs as delineated in the Settlement Agreement—the Deposited Assets Class, the Looted Assets Class, Slave Labor I, Slave Labor II, and the Refugee Class—and arriving at an acceptable sum of money for which to settle. But equally important was deciding what entities should be released from future liability. As a general matter, the settlement sought to release all businesses "where at least 25 percent of the outstanding stock is owned by a Swiss company." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d. at 160. Without explicitly identifying them, the Settlement Agreement thus proposed to release Swiss insurance companies. The parties were conscious of this and specifically excluded from these releases three Swiss insurance companies—Basler Lebens-Versicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs Gesellschaft—against which litigation was pending in the United States. They were excluded "to the extent of insurance claims of the type asserted in *Cornell, et al. v. Assicurazioni Generali S.p.A.*, 97 Civ. 2262 (S.D.N.Y.)." Settlement Agreement, Section 1, Definitions.

The initial decision to release all Swiss businesses—except for three named Swiss insurance companies—from future liability was based on practical considerations. A global settlement was the only way the defendants would agree to a $1.25 billion settlement, and when it became apparent that such a settlement would include Swiss insurance companies, plaintiffs' counsel considered their options. None of the released insurance companies were subject to personal jurisdiction in the United States. And because bringing suit elsewhere was not a realistic option, plaintiffs' counsel concluded that they were giving up essentially nothing

by agreeing to the releases. In the context of a $1.25 billion settlement, plaintiffs' counsel decided that agreeing to the exchange brought substantially more benefit to victims of Nazi persecution than could have been achieved by litigation.

After the Settlement Agreement was consummated, I began to disseminate notice in May 1999. The notice plan I employed was extensive and is described in *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d. at 144–45. Among the most critical aspects of the notice plan was designing a way for class members and other interested parties to raise objections to the Settlement Agreement. I ordered that all objections from interested parties be filed in writing by October 22, 1999. *See* Order, dated May 10, 1999. Then, on November 29, 1999, I would hold a fairness hearing where objectors and other interested parties could voice their concerns. *Id.*

Before the October 22, 1999 deadline, I received approximately 200 written comments and objections to the Settlement Agreement. Only one concerned the release of Swiss insurance companies. That objection, dated October 20, 1999, was filed by Washington State Insurance Commissioner Deborah Senn. *See* Partial Objection of Washington State Insurance Commissioner Deborah Senn to Class Action Settlement (hereafter "Senn Objection"). Commissioner Senn recognized that she was not a part of the class of plaintiffs but moved for leave to object on the grounds that she "believe[d] that insurance claims involving all Swiss insurers and reinsurers, and not just these three named companies [that were excluded from the releases], should be handled by the existing International Commission on Holocaust Era Insurance Claims." Motion of Washington State Insurance Commissioner Deborah Senn to file Partial Objec-

tion to Class Action Settlement, at 1–2. The International Commission on Holocaust Era Insurance Claims (ICHEIC) was established in 1998 after negotiations among the World Jewish Restitution Organization (WJRO), United States insurance regulators, and several European insurance companies. *See generally www.icheic.org*. It was designed to provide Holocaust survivors and their heirs with a way to identify and obtain payment for insurance claims never paid in the wake of the Holocaust. It works closely with the German Foundation "Remembrance, Responsibility, and the Future" (hereafter "the German Foundation"), which administers a $5 billion fund established in 1999 to provide money for claimants against German companies, including insurance companies.

Commissioner Senn made two basic objections. She summarized the first point of her argument as follows:

> The proposed settlement is unfair to insurance policyholders and beneficiaries. It releases all claims against all Swiss insurers and reinsurers (except only Winterthur, Basler Lebens and Zurich). There has been no public review of their records to determine their unpaid Holocaust policies or their value. These companies may be released from many millions of dollars of wrongfully unpaid claims in exchange for relatively *de minimis* payments to policyholders or their heirs. Class members are required to decide whether to opt out of the class without even being told whether they or a family member were covered by policies or the face amount of such policies, although this information may be in the possession of the settling companies. The proposed settlement undermines the International Commission on Holocaust Era Insurance

> Claims whose protocols provide identification, valuation and payment of policies.

Senn Objection, at 1–2. Her second claim was that,

> [t]he settlement notice is inadequate. It does not provide notice of the specific insurance companies whose polices are covered by the release. It does not inform class members that participation in the settlement would preclude them [from] recovering on insurance policies through ICHEIC. And perhaps most egregiously, the notice and glossary largely conceal from all but the most careful reader that insurance policy claims are even subject to the settlement and release.

Id. at 2. In other words, Commissioner Senn maintained that the Settlement Agreement "creates a substantial possibility that class members will unintentionally and unknowingly release insurance claims of substantial value." *Id.* at 7. Again, Commissioner Senn's objection was the *only* objection received in a timely fashion that dealt with the insurance releases. Mr. Dubbin submitted nothing.

Subsequently, on November 18, 1999, Lawrence Eagleburger, the Chairman of ICHEIC, submitted a letter echoing the sentiments of Commissioner Senn. *See* Letter from Lawrence Eagleburger to Judge Korman, dated November 18, 1999. He explained that "ICHEIC has established a claims process for the payment of unpaid Holocaust-era insurance claims." *Id.* at 1. He continued:

> We are attempting to persuade all companies with Holocaust-era liabilities to join ICHEIC in order to provide as comprehensive a mechanism as possible for resolving unpaid insurance policies. Accord-

> ingly, the Swiss Life Group, along with some other companies, was invited to join the Commission in June 1999. Thus far, they have not responded.
>
> Under the settlement agreement as now proposed, Swiss insurance companies which are not participating in the ICHEIC process will be relieved of any Holocaust-era obligations, while those which are being cooperative will not be released. This anomalous result would appear to be manifestly unfair to the very people we are trying to help: those with legitimate claims.

Id. at 2. While the thrust of the Senn and Eagleburger objections was on maintaining the ongoing viability of ICHEIC—something not ultimately relevant to the decision to amend the Settlement Agreement—they caused me to focus on the validity of the insurance releases.

Not until one more week had passed (and only five days remained until the fairness hearing) did I receive anything from either Mr. Dubbin or his client, Dr. Weiss. Specifically, on November 24, 1999, I received a letter via fax from Dr. Weiss, which stated, in its entirety:

> Dear Judge Korman,
>
> It was brought to my attention that the Swiss bank settlement of $1.25 billion releases the Swiss insurance companies, except for the three companies named in the class action lawsuit, from any further liability. *This is completely unacceptable, as many Swiss insurance companies acted as cloaking agents for Munich [Reinsurance] of Germany during WWII.* U.S. military and intelligence/legal documents from 1944–47 state this explicitly and charge Munich Re: with criminal activity. Additionally, this surreptitious inclusion of these companies is not known to the general survivor community. Your

assistance to remove this inappropriate blanket amnesty for the Swiss insurance industry is vital.

The Bergier report states that the amount that the Swiss owe regarding stolen WWII gold may exceed six billion dollars. The documents further state that although the Swiss banking industry stopped receiving gold at a point before the end of the war (as a result of Treasury Secretary Henry Morganthau's admonition that there will be a day of reckoning) the Swiss insurance industry continued receiving stolen gold up to the last days of the war. Justice demands that the Swiss insurance industry not escape its responsibility.

Sincerely,

Thomas Weiss, MD

Letter from Thomas Weiss to Judge Korman, dated November 24, 1999 (emphasis added). This letter was the only written submission I received from either Mr. Dubbin or Dr. Weiss in advance of the fairness hearing, and it was more than thirty days after the deadline for submitting written objections had passed. The letter itself stated little more than a general notion that the insurance companies had done wrong and that releasing them was therefore inappropriate. More to the point, the letter did not address the actual defect in the insurance releases, focusing instead on the extent to which Swiss insurance companies engaged in cloaking assets. Whether a company cloaked—that is, hid—assets on behalf of the Nazis is wholly irrelevant to a claimant who is seeking to recover from an insurance company for a policy once held by a victim of Nazi persecution. Moreover, to the extent that it dealt with Swiss insurance companies' dealing with Nazi gold, it could only be relevant to a Looted Assets claim, which, as I have

explained, could never have survived a motion to dismiss. *See In re Holocaust Victim Assets Litig.*, at 93–94; *see also In re Holocaust Victim Assets Litig.*, 14 Fed.Appx. 132, 134 (2d Cir.2001) (stating that looted assets claims were "based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate"). It is with these submissions that I approached the fairness hearing.

Many people spoke at the fairness hearing, including survivors, attorneys, and interested members of the community. Early in the day, Roman Kent, a Holocaust survivor and Chairman of the Board of the American Gathering of Jewish Holocaust Survivors, spoke. He commended the settlement but added that, "under no circumstances [should] this settlement TTT give what I call a one-way street to heaven to the insurance companies." Fairness Hearing Transcript, at 23. He continued: "The insurance companies are subject to the International Committee of Insurances, which is chaired by [Lawrence Eagleburger], and they should not get a blank, what you can call maybe legal closure, whatever it is, because they should be subject to the international insurance claims." *Id.* Mr. Dubbin spoke later and added little. But he was not alone. Two more lawyers, first Mark Dunaevsky and later Norman Rosenbaum, followed Mr. Dubbin and once again echoed the same concerns. *See id.* at 88–91, 175. Neither of these lawyers sought a fee. In any event, I turn now to Mr. Dubbin's testimony.

Mr. Dubbin explained his purpose as follows:

> My specific point today is to address one aspect of the settlement in particular, and that is the extent to which the settlement purports to release an infinite

> number of unnamed Swiss companies, particularly insurance companies, other than those which are enumerated in the settlement agreement as being involved with the International Commission on Insurance Claims.

Fairness Hearing Transcript, at 62. First, Mr. Dubbin's description of the Settlement Agreement was incorrect and reflected both his general lack of familiarity with the Settlement Agreement and his ill-prepared presentation. As I explained earlier, the Settlement Agreement specifically excluded certain insurance companies from its definition of Releasee, but not those that Mr. Dubbin identified. Instead, it named three companies known to be subject to personal jurisdiction—and indeed, facing pending litigation—in the United States. Whether or not they were involved with ICHEIC was irrelevant.

Mr. Dubbin next proceeded to present information concerning German insurance companies that had "used a variety of dummy companies or real companies to cloak their real assets and resources." *Id.* at 63. He explained that Dr. Weiss had done research on this issue and could present documentation as to the extent of such activity. He then described in detail a report from the Office of Military Government for Germany, dated September 1946, that provided an example of such cloaking. But this discussion, too, revealed Mr. Dubbin's misunderstanding of the Settlement Agreement. The Settlement Agreement expressly excluded from its definition of Releasees many (although not all) companies that "disguised the identity value, or ownership of Cloaked Assets or Slave Labor." Settlement Agreement, Section 1. Indeed, Mr. Dubbin now concedes that this provision of the Settlement Agreement "would have prevented a release to companies that are . . . direct corporate descendants of pre–1945 German companies (or com-

panies headquartered in an Axis controlled country) and which also cloaked assets." Response to Neuborne Supple-mental Declaration filed by Samuel J. Dubbin, dated September 5, 2003, at 12 (hereafter "September 5, 2003 Response"). Between this misconception and the more central fact that Mr. Dubbin completely failed to address how the cloaking of Nazi assets would impact beneficiaries to insurance policies and their heirs in their attempt to collect on insurance claims, Mr. Dubbin's complaint was largely beside the point. Indeed, it failed altogether to address the central issue of prejudice suffered by beneficiaries of policies issued by released insurance companies.

Mr. Dubbin concluded his remarks as follows:

> So the question presented by this, and I have other documents here that come to the same basic conclusion, is why a blanket release of unnamed and unidentified companies, which we know from evidence in the archives may well have been beneficiaries of looted Jewish assets through the access in Nazi insurance trusts, without being even identified or held to account in any way, shape or form for what their responsibilities are.
>
> I know that Commissioner Senn in the State of Washington and Chairman Eagleburger have brought this question to the Court's attention. But particularly in light of some of the documents we have found, we felt on behalf of the Florida survivor community and Dr. Weiss in particular, we would urge you—and I know Mr. Neuborne said if we have any problems with the settlement, please bring them to his attention.
>
> I don't know what benefit accrues to survivors from what may be a big surprise at the end of the road,

> when we find out some of the companies not even identified today being released could well be as culpable as some of the ones who we've been talking about all these years. Thank you very much.

Fairness Hearing Transcript, at 65–66. This testimony is the sum total of Mr. Dubbin's contribution to my consideration of the insurance releases. It utilized his client's research to repeat and elaborate on the letter his client had sent me a week earlier. The testimony focused on looted assets and added nothing to the legal arguments that Commissioner Senn had already advanced in a timely fashion. Nor did it raise the valid legal claim that troubled me the most and that ultimately compelled me to direct the renegotiation of the insurance releases.

Directly after the fairness hearing, concerns that had been brewing led me to call a conference with the parties. After the parties had a time to prepare, we held a conference on December 22, 1999, some three weeks after the fairness hearing. One of the purposes of the meeting, as recorded by Deputy Special Master Shari Reig, was to "discuss[ ] the two key issues that Judge Korman has made it clear he wants to resolve prior to ruling on the fairness of the settlement—art and insurance." Memorandum from Shari C. Reig to Judah Gribetz, dated December 27, 1999. In the end, I insisted that the insurance releases be renegotiated not because Swiss insurance companies had cloaked assets or engaged in other wrongdoing unrelated to avoiding payment of insurance policies issued to victims of Nazi persecution. Rather, I was concerned with the straightforward legal point that, as originally drafted, the insurance releases were unenforceable because Swiss insurance companies were released from claims by beneficiaries or heirs who were not receiving any direct and distinct benefit for these releases. In addition, these

potential claimants were not adequately informed that their claims were being released. In granting the releases, the parties had implicitly recognized that, because of the lack of personal jurisdiction over these companies and the difficulties that would have almost certainly prevented successful lawsuits anywhere else, the releases were essentially worthless and unenforceable. Nevertheless, as a legal matter, they were claims that could not be signed away without some *quid pro quo*. *See National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981). Or, as Mr. Dubbin put it for the first time in defending his fee application (four years after the fairness hearing):

> In *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981), the Second Circuit squarely rejected the argument that it would acceptable for a federal court to approve a settlement that compromised some claims for no consideration because a subsequent court might refuse to enforce the release language due to its invalidity. The settlement negotiators in *Super Spuds* urged the Court to approve a class settlement that released certain claims for no consideration because the state court where the released claims might later be pressed could decide whether the federal class action release was in fact valid. The Second Circuit did not agree: "A federal court should determine for itself whether it has that power and may properly exercise it, not pass over the question because a state court may assume the unenviable task of deciding that its act was a nullity."

September 5, 2003 Response, at 14. Of course, Mr. Dubbin never made this argument until his fee was at stake, years after the issue of insurance releases had been resolved.

By the time of the December 22, 1999 meeting, I had become convinced that the insurance releases were unenforceable as drafted. Indeed, when I eventually approved the amended settlement, I wrote: "[I]f the carriers do not reaffirm [the amended insurance releases], I will issue a supplemental decision on the enforceability of the original insurance releases." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d at 165. I was prepared to hold them unenforceable as violating the consideration requirement of *National Super Spuds*, 660 F.2d 9. This legal defect is why I asked Professor Neuborne to reenter negotiations. It had nothing to do with the five minutes of testimony Mr. Dubbin had presented at the fairness hearing. If any submission is to be credited for opening this reconsideration, it is that of Commissioner Senn, who in a *timely fashion* pointed out that there was a problem with the "*de minimis*" return class members were going to receive from the insurance releases and the general insufficiency of the notice.

Six weeks after I had directed Professor Neuborne to renegotiate the insurance releases, and a full three months after it was due, Mr. Dubbin filed a written objection to the Settlement Agreement. *See* Objection of South Florida Holocaust Survivors Coalition and Thomas Weiss, M.S., dated January 31, 2000 (hereafter "Settlement Agreement Objection"). There is no suggestion that Mr. Dubbin was unaware of the filing deadlines or otherwise prevented from submitting a timely filing. To the contrary, on October 21, 1999, he had written to Special Master Judah Gribetz and stated that he and his clients "understand that objections to the overall settlement are due on October 22." Letter from Samuel J. Dubbin to Judah Gribetz, dated October 21, 1999 (appended to Settlement Agreement Objection). Yet at that time he had not requested additional time to file an

objection; he had simply requested an opportunity to appear at the fairness hearing, which of course, he was given. Mr. Dubbin did not even mention insurance releases as something he wished to address.

Ultimately, Mr. Dubbin's belated objection was of no consequence. It chronicled archival research that Dr. Weiss had uncovered and that purportedly revealed the expansive scope of the Nazi era insurance scandal, with particular reference to insurance companies being used to cloak assets. *See* Settlement Agreement Objection. In the context of the Settlement Agreement, this research was largely beside the point. At core, Mr. Dubbin's objection made three arguments:

> This filing addresses three substantial reasons it would be unfair for the Court to approve the blanket release of Swiss insurance companies as now proposed. First, several Swiss insurers were used to cloak the assets of the major Nazi-based insurance companies, Allianz and Munich Reinsurance. No one knows today which releasees might be responsible for portions of hundreds of thou-sands of insurance policies or other Jewish assets that were successfully cloaked by Allianz and Munich Re within Swiss companies. Second, these transfers and cloaking efforts were designed to conceal a massive German insurance and reinsurance juggernaut which grew to dominate the European insurance market by virtue of the Nazi oppression and economic power. The key was the invisible reinsurance market, through which the Nazis controlled insurers and thereby business and finance throughout Europe. As one important Allied Report noted, the insurance business was regarded as 'the handmaiden of German industrial expansion in occupied countries.' Third, Swiss insurers profited directly and hand-

> somely from the German insurance market during World War II. They also profited from gold looted by the Nazis from Jews and other victims.

Settlement Agreement Objection, at 6–7. That Swiss insurance companies had engaged in wrongdoing was never in dispute. But to the extent that this wrongdoing consisted of cloaking assets, there could be no legal liability without some showing that cloaking of assets in some way prejudiced the ability of insurance policy beneficiaries to collect. The only issue that was in dispute was what should be done about Swiss insurance companies that were not subject to personal jurisdiction in the United States and against which claims could be made for insurance policies issued to victims of the Holocaust. In the course of his objection, Mr. Dubbin did not even quote the definition of Releasees. Nor did he account for the exclusion of certain insurance companies that had engaged in cloaking assets. Indeed, although he wrote in his objection that "[t]he central question concerning the present releases is the extent to which Swiss insurers who would be released are, in reality, direct economic descendants of the Nazi insurance and reinsurance empire which deprived hundreds of thousands of Holocaust victims of their insurance moneys," *see id.* at 20, he conceded years later that the definition of Releasees "would have prevented a release to companies that are TTT direct corporate descendants of pre–1945 German companies (or companies headquartered in an Axis controlled country) and which also cloaked assets." September 5, 2003 Response, at 12.

The likely reason that Mr. Dubbin's objection was not narrowly tailored to the Settlement Agreement in this case is that it was based on research his client had done in preparing for a separate litigation. Since 1998, Mr. Dubbin had represented Dr. Weiss in a multi-district lit-

igation case pending in the Southern District of New York in which Dr. Weiss was suing an Italian insurance company, Assicurzaioni Generali, S.p.A., for recovery on an insurance policy purchased by his father prior to World War II. Mr. Dubbin summarized the work that Dr. Weiss had done:

> By early 1998, Dr. Weiss had begun to conduct and commission private research from various archival and academic sources, including the U.S. National Archives in Washington, D.C.; European archives; specialized repositories of information such as the College of Insurance in New York City; Yad Vashem (the Holocaust Memorial Museum in Jerusalem); and other sources; as well as to consult at length with insurance experts such as Professor Joseph Belth, Professor Emeritus of Insurance at Indiana University. At considerable personal expense in time and money, Dr. Weiss retrieved and analyzed thousands of pages of archival records, most of which described decades-old business transactions in the lexicon of the early and mid–20th Century. The Florida Survivor's written Objections and later filings with the Court reflect many of the countless hours Counsel and Dr. Weiss spent scouring, digesting, analyzing, and discussing those materials.

Fees Motion, at 15. At my request, Mr. Dubbin provided me with copies of several of his filings in the *Generali* case, and they are substantial. These, in conjunction with the Settlement Agreement Objection, reveal that Dr. Weiss had indeed performed research regarding not only the insurance policy belonging to Dr. Weiss's father, but also the practice of Nazi era insurers and reinsurers in general. Nevertheless, that research has had no impact

on this case. Or, as Professor Neuborne has written, "the work was unnecessary." Supplemental Neuborne Declaration, at 10. Dr. Weiss, who performed the research but withdrew his compensation request, has apparently come to recognize this. Mr. Dubbin has not.

In any event, the negotiations that recommenced in mid-December 1999 continued for some months. Mr. Dubbin argues that, even if his belated written objection played no role in the decision to reassess the issue of claims to life insurance policies, he should be compensated for it because he was not made aware of the negotiations until April 2000. *See* September 5, 2003 Response, at 10–11. It would be a different matter if Mr. Dubbin had gone to the time and effort to file his objection in a timely fashion. If the objection had any merit, then it might be unfair to deny him a fee because he could have been working on the assumption that a written objection was necessary. Here, his written objection was filed three months late and two months after other more pertinent objections had been raised. He could make no assumptions. Indeed, the best that he could have hoped for was that his written submission would not be rejected as untimely.

Mr. Dubbin also complains of not being invited to join the negotiations. Mr. Dubbin claims that immediately after learning of the negotiations, he wrote to both parties seeking a chance to participate. *See* Letter from Samuel J. Dubbin to Professor Neuborne and Mark Kahn, dated April 10, 2000. Though Professor Neuborne contends that Mr. Dubbin was in fact alerted long before of the existence of negotiations, *see* Supplemental Neuborne Declaration, at 10, this debate is irrelevant as Mr. Dubbin has never suggested that he was affirmatively misled on this score. Professor Neuborne

responded to Mr. Dubbin's request on May 12, 2000 by writing:

> I sympathize with your desire to play a more significant role in this case. Unfortunately, no complex class action can open the negotiation process to every lawyer who asserts expertise and interest. Your concerns with the original insurance releases were widely shared, and have been the subject of discussion between and among highly skilled counsel for many months. I can assure you that whatever potential settlement emerges from the ongoing insurance discussions, your clients will have a full opportunity to opt out of any insurance agreement with which they disagree, without jeopardizing their other rights under the basic settlement agreement. I can also assure you that any agreement that emerges will be subject to notice, public comment, and a full hearing before the Court under Rule 23(e).

Letter from Professor Neuborne to Mr. Dubbin, dated May 12, 2000.

In May 2000, after considerable negotiations, the parties (without Mr. Dubbin's involvement) were able to agree on acceptable language for an amendment to the Settlement Agreement concerning the releases given to Swiss insurance companies. In approving the amended Settlement Agreement, I described the development as follows:

> In connection with the fairness hearings, I received several well-taken objections to the inclusion of insurers as 'Releasees' under the Settlement Agreement. The objections related to the effectiveness of notice as to claims against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-

> related insurance claims as part of the distribution of the settlement fund.

In re Holocaust Victim Assets Litig., 105 F.Supp.2d at 160. Mr. Dubbin appears to argue that my three words, "well-taken objections," entitle him to a fee. *See* Fees Motion, at 18. I disagree. If this language caused Mr. Dubbin to assume that his was one of the "well-taken objections" that I credited with bringing about the amended insurance releases, then I painted with too broad a brush. If any objection merited credit it was that of Commissioner Senn, which was filed in a timely fashion and at least alluded to one of the ultimate defects in the releases. Mr. Dubbin, of course, adopted by reference her objection and the related objection of Chairman Eagleburger when speaking at the fairness hearing. In any event, I continued:

> [T]he parties and major Swiss insurers released under the Settlement Agreement, after extensive discussions, have agreed on a mechanism to evaluate and pay Holocaust-related insurance claims. The mechanism, set forth in Article 4 of Amendment 2 to the Settlement Agreement, specifically designates up to $100 million (including up to an additional $50 million provided by the insurers themselves) for the resolution of unpaid insurance claims. The mechanism provides for prompt and fair consideration of all insurance claims, appropriate multipliers for such claims, full cooperation of the participating insurers in providing relevant documentary material to potential claimants (subject to monitoring by the Swiss insurance supervisor) and assurance of payment from the settling defendants. The amendment also contains a provision that acknowledges my power to order participating insurers to disclose the

> holders of policies, with the consequence of an insurer's failure to comply being the exclusion of such insurer from all provisions of the Settlement Agreement. My power to order such disclosure is subject to the application of certain standards that are not inconsistent with the good faith duty of a releasee to make disclosures necessary to permit class beneficiaries to obtain the benefits of the Settlement Agreement. The details of the insurance claims mechanism and the list of participating released insurers will be part of the notice of the proposed plan of allocation and distribution, and class members will have an opportunity to opt out of the insurance provisions of Amendment 2.

Id. (internal citation removed). Under the circumstances, the amendment to the Settlement Agreement alleviated my concerns about the insurance releases. I wrote:

> I find that the insurance provisions of Amendment 2 are fair and reasonable, and adequately address the concerns raised in the objections submitted in connection with the fairness hearings. Accordingly, they merit approval as part of the settlement. In reaching this decision, I have considered all of the relevant factors and circumstances, including the status of insurers as releasees under the Settlement Agreement, the addition of up to $50 million to the settlement amount and the unavailability of a superior mechanism for the payment of Holocaust-related claims involving such insurers. I have also relied upon the following representations by the participating insurance carriers: (i) the amount of unpaid 'Policy Claims' under Amendment 2 is not likely to exceed $100 million in the aggregate (including multipliers) and (ii) most of the partici-

> pating insurance carriers have reasonably complete surviving documentation that will permit them (and the settlement's insurance claims mechanism contemplated by Amendment 2) to provide fair and efficient consideration of all claims.

Id.

After I had approved the fairness of the amended Settlement Agreement, Mr. Dubbin wrote a letter outlining alleged deficiencies in the Settlement Agreement as it pertained to insurance companies. *See* Letter from Samuel Dubbin to Judge Korman, dated September 1, 2000 (appended to Declaration of Samuel J. Dubbin, dated March 31, 2004). Shortly thereafter, Mr. Dubbin informed me (either directly or through Professor Neuborne) of his intent to file a notice of appeal from my judgment on behalf of Dr. Weiss. Mr. Dubbin asked if I would speak with Dr. Weiss in advance of any notice of appeal, and ultimately, a telephone conference was held between myself, Mr. Dubbin, Dr. Weiss, and Professor Neuborne. That conference is described briefly in my March 9, 2004 memorandum and order, *see In re Holocaust Victim Assets Litig.*, at 117–118. I explained to Mr. Dubbin and Dr. Weiss that their proposed appeal was without merit and I attempted to convince them that filing a notice of appeal could only harm the class. They were unconvinced. More important for the purpose of this opinion, at the meeting they revealed their true colors. After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me to provide attorneys fees and funds for private research that would assist him in his litigation against Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to

Holocaust survivors. Professor Neuborne described the incident more diplomatically as follows:

> Any person familiar with class action litigation will understand that Mr. Dubbin's tactic in filing the appeal was an effort to play 'hold-up,' by placing a legal obstacle in the path of the settlement's administration that could be removed by acceding to his client's financial demands. In fact, his client attempted to extract funds from the settlement class to fund a Holocaust-related research institution that he would head.

Affirmation of Professor Neuborne, dated February 18, 2004. Any doubt that this was an attempted "hold-up" is eliminated by comparing the glowing description of the amended Settlement Agreement contained in Mr. Dubbin's fee application with what came next.

On September 7, 2000, Mr. Dubbin filed, on behalf of Dr. Weiss, an appeal from the judgment approving the amended Settlement Agreement. Eventually, Mr. Dubbin would withdraw the appeal without ever filing a brief. Professor Neuborne placed this in context: "When [months later] the Court refused even to appear to bargain over the withdrawal of the appeal, and I adamantly refused to engage in negotiations, Mr. Dubbin unconditionally withdrew the appeal filed on behalf of Dr. Weiss without ever making a serious effort to prosecute it." *Id.* Though Mr. Dubbin contends that this appeal produced concrete results, *see* Fees Motion, at 62–63 (citing Letter from Professor Neuborne to Mr. Dubbin, dated May 15, 2001), I disagree. It certainly did not change anything with respect to Swiss insurance companies. Regardless, other appeals remained, and not until July 26, 2001 did the Second Circuit affirm my decision,

allowing distribution to begin. *See In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir.2001).

To recap, this is what Mr. Dubbin did in connection with the renegotiation of the releases of Swiss insurance companies in this case: First, he submitted nothing prior to the deadline for written objections to the Settlement Agreement and nothing prior to the fairness hearing. Second, Mr. Dubbin spoke briefly at the fairness hearing repeating the sentiments and research of his client, expressing his approval of objections that had been filed in a timely matter by other individuals, and adding his concern that many Swiss insurance companies engaged in cloaking assets. Third, Mr. Dubbin filed a largely irrelevant written objection based on research by his client three months late and six weeks after I had decided that the insurance releases were unenforceable. Fourth, Mr. Dubbin stood by as his client attempted to extort a significant cash award from a fund belonging to Holocaust survivors in exchange for not filing a notice of appeal from my judgment approving the fairness of the settlement. And fifth, Mr. Dubbin filed that notice of appeal. For this, he initially sought $600,000, and now seeks $309,051 in fees plus $41,318 in disbursements.

Discussion

Not all work is entitled to be compensated, even when that work is done in the context of a lawsuit. In this case, Mr. Dubbin is seeking payment from the settlement fund under "the common fund doctrine."

> The common fund doctrine allows a court to distribute attorney's fees from the common fund that is created for the satisfaction of class members' claims when a class action reaches settlement or judgment.

> The doctrine is grounded in the principles of quantum meruit and unjust enrichment, in two senses. First, the doctrine prevents unjust enrichment of absent members of the class at the expense of the attorneys. It is meant to compensate the attorneys in proportion to the benefit they have obtained for the entire class (the fund), not just the representative members with whom they have contracted. Second, the doctrine prevents the unjust enrichment of absent class members at the expense of the class representatives. In the absence of the doctrine, only the present members, who hired the attorneys, would have to pay attorney's fees, while all the members, both absent and present, would enjoy the benefits of the settlement or judgment. The members who did not hire the attorneys would be unjustly enriched at the expense of those who did.

Newberg on Class Actions, § 14.6 (4th ed.2002). The Second Circuit has stated that in common fund cases, "a fee award should be assessed based on scrutiny of the unique circumstances of each case, and a jealous regard to the rights of those who are interested in the fund." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 53 (2d Cir.2000). More important for this case, the common fund doctrine presumes that, if attorneys' fees are to be paid from the fund, it will be because some benefit— be it monetary or otherwise—was conferred on the class by virtue of the attorney's work. After all, "[t]hose who receive no benefit from the lawyer's work should not be required to pay for it." *Van Gemert v. Boeing, Co.*, 573 F.2d 733, 736 (2d Cir.1978). Mr. Dubbin himself wrote that "a paramount consideration for awarding fees to an objector is the benefit to the class, [and] it is only appropriate that the amount of the fee award bear a rea-

sonable relationship to the benefit conferred by virtue of the objections." Fees Motion, at 41.

Mr. Dubbin claims that his work in response to the proposed releases "led to the preservation of the worldwide class of Holocaust Survivors' claims against Swiss insurers, with a minimum value of $100 million." Fees Motion, at 1. Before I address the claim that Mr. Dubbin's work *caused* the renegotiation of insurance releases, I turn to Mr. Dubbin's claim that the amendment to the Settlement Agreement as it related to insurance companies was worth $100 million. Mr. Dubbin has written that, "[i]n approving the modified Settlement, the Court estimated the value of potential claims against Swiss insurers to be $100 million." *Id.* at 4. That is inaccurate. In my memorandum and order approving the amended settlement, I explained that the amendment of the Settlement Agreement relating to insurance companies created a means for claimants to seek money for unpaid insurance claims. I then wrote: "The mechanism, set forth in Article 4 of Amendment 2 to the Settlement Agreement, specifically designates up to $100 million (including up to an additional $50 million provided by the insurers themselves) for the resolution of unpaid insurance claims." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d at 160. This was not an estimate of value; it was a description of the mechanism of distribution. The $100 million figure was a cap on payments, and it was set as a figure that the parties knew was far higher than any reasonable estimate of claims. Indeed, only two Swiss insurance companies ultimately agreed to the conditions necessary to be granted a release. The Special Master's Interim Report on Distribution and Recommendation for Allocation of Excess and Possible Unclaimed Residual Funds, (hereafter "Interim Report"), explained: "In a document dated July 26, 2001, the par-

ties entered into an agreement to process insurance claims for policies issued by the Swiss insurers Swiss Re and Swiss Life. No other Swiss insurers will receive releases in connection with this litigation" with respect to their duty to beneficiaries of insurance policies. Interim Report, at 106. As of June 30, 2003, only 1,238 claims to insurance policies had been submitted and found eligible for processing. *See id.*, at 108–9. Of the claims that have been specifically researched by insurance companies, most have been referred to the German Foundation Initiative for possible payment from the $5 billion fund it created. *Id.* at 109.

Mr. Dubbin alternatively contends that I am bound to value the aspect of the amendment to the Settlement Agreement that relates to insurance companies based on the total potential value to the class. *See* Sept. 5, 2003 Response, at 22 n. 26 (citing Newberg on Class Actions, at § 11–29; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir.1999)). He claims that because the potential added value was $100 million—in fact, it was only $50 million in "new money," *see* Letter from Samuel Dubbin to Judge Korman, dated September 1, 2000, at 5—this is the relevant value for awarding his fee. Mr. Dubbin is wrong. The cases he cites *allow* a court to treat the potential value to the class as the relevant value for measuring attorneys fees, but they do not require it. Meanwhile, to the extent that Mr. Dubbin claims that the amendment added value because it made clear that insurance companies which did not participate in the distribution mechanism would not be released, Professor Neuborne accurately described the value of this narrowing as follows:

> Assuming that the narrowing of the insurance releases permits a Holocaust victim to sue a Swiss

> insurance company, the actual economic value of such a claim appears quite modest. Insurance policies issued by Swiss companies in the German market are already covered by the German Foundation and by ICHEIC. My research indicates that virtually all Swiss-market policies have been paid. Thus, the insurance policy exposure appears to be for Swiss companies doing business in Europe, other than in Germany. While such potential liability may be significant, there is no reliable basis for assessing its economic value. Moreover, none of the originally released Swiss insurance companies appear to be within the *in personam* jurisdiction of a United States Court. The three Swiss insurance companies that appeared to be within the *in personam* jurisdiction of an American court had already been carved out of any insurance release. I know of no foreign tribunal in which such claims can be pressed effectively. Swiss pleading law makes it virtually impossible to use Swiss courts.

Supplemental Neuborne Declaration, dated July 21, 2003, at 8. This estimate is more realistic, and more tied to possible legal recovery, than the estimate of value provided by Mr. Dubbin's expert in today's belated and untimely filing. *See* Modified Fee Request, at ¶¶ 12–15. Indeed, Mr. Dubbin's expert fails entirely to address the practical reality that it was impossible for beneficiaries and their heirs to sue and recover against the companies that were no longer released. Professor Neuborne recognized that there was *some* value added by the amendment to the Settlement Agreement as it related to insurance companies, but concluded that it was "quite modest, and unlikely to yield more than several million dollars in recoveries." *Id.* at 9. In retrospect, with only

two participating companies, even this has proved to be optimistic.

In any event, the precise value of the amendment regarding insurance companies is immaterial because Mr. Dubbin did not contribute to the amendment. Again, to be rewarded fees from a common fund as compensation for conferring a material benefit on the class, an individual must have actually done the work that led to the material benefit. *See Savoie v. Merchants Bank*, 84 F.3d 52, 56–57 (2d Cir.1996) (stating that "the district court must determine whether plaintiff's suit was a substantial cause of the benefit obtained."); *Savoie v. Merchants Bank*, 166 F.3d 456, 463 (2d Cir.1999) (affirming district court's denial of fees for work not "pursuing the interests of the class"); *Kaplan v. Rand*, 192 F.3d 60, 69 (2d Cir. 1999). Professor Neuborne described the effect of Mr. Dubbin's efforts as follows:

> Viewed most generously, Mr. Dubbin's efforts were helpful in reassessing the scope of insurance releases involving Swiss insurers who are not subject to *in personam* jurisdiction in the courts of the United States, and in exploring the possibility of inkind health care benefits to members of the plaintiff class. Ufortunately, neither initiative appears likely to confer a material benefit to members of the plaintiff-class.

Second Supplemental Declaration of Burt Neuborne Concerning the Award of Attorneys' Fees, dated April 10, 2002, at ¶ 5. In an earlier decision in this case, I explained at great length my reasons for crediting Professor Neuborne's opinion on the subject of attorneys' contributions to this case and appropriate fee awards. *See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d at 316–19. I stand by that belief, but I find Professor

Neuborne's assessment of Mr. Dubbin's contribution to be overly generous. Mr. Dubbin cannot be credited at all for the renegotiation of the insurance releases in this case. His work was late, tangential, and ultimately irrelevant. While Mr. Dubbin has submitted timely and impressive work in connection with his fee application, he did not display such attention to his original objections.

Mr. Dubbin has argued that his objections were necessary because Commissioner Senn and Chairman Eagleburger lacked standing to object. *See* September 5, 2003 Response, at 8. He wrote: "In contrast, [my] clients, Dr. Weiss and the South Florida Survivors' Coalition, were the only objectors with standing to object, and who could have appealed an adverse ruling based on flaws in the insurance releases. [My] submission made it impossible for the Court to ignore the issue." *Id.* First, only Dr. Weiss appealed from my judgment approving the settlement. Second, it is hardly clear that either Dr. Weiss or the South Florida Survivors' Coalition had standing. Dr. Weiss's standing cannot be based on his insurance claim involving Generali, an Italian company not released in the settlement. The South Florida Survivors Coalition, meanwhile, never produced evidence of any member with standing. *See In re Holocaust Victim Assets Litig.*, at 114–117. If the only standing of either is based on the fact that Dr. Weiss is the child of Holocaust survivors, he had no greater standing than Roman Kent, a survivor who spoke at the fairness hearing along with Mr. Dubbin. Regardless, even if I concluded that Dr. Weiss or the South Florida Survivors' Coalition did have standing and all other objectors did not, that bare fact would hardly be enough to warrant the $2.9 million in fees initially sought by Mr. Dubbin and Dr. Weiss or even the newly reduced amount of $300,000 sought by

Mr. Dubbin. My own concerns made it impossible for me to ignore the issue—not Mr. Dubbin's belated submission. In a settlement as global and important as this, I was not going to refuse to consider a meritorious objection because the objector lacked standing. *See e.g., In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (where I considered at great length the meritless arguments and objections of HSF–USA even though I found it did not have standing to object).

Mr. Dubbin has also suggested that were I to find—as I do—that his work made no contribution, it would be tantamount to breaking a promise. This argument is baseless. Mr. Dubbin relies on various statements by Professor Neuborne, not by me. On May 15, 2001, for example, Professor Neuborne wrote to Mr. Dubbin, "I have been impressed with the intensity of Dr. Tom Weiss's interest and the value of his contributions in this case." Letter from Professor Neuborne to Mr. Dubbin, dated May 15, 2001, at 2. Mr. Dubbin, of course, is not entitled to be compensated for his client's contributions. Unlike the usual case in which a lawyer performs the work, here it is uncontested that it was Dr. Weiss who did all of the research and the lawyer who added little (notwithstanding the statements of support by Dr. Weiss). Regardless, Mr. Dubbin also claims that when I met with him and Professor Neuborne in April 2001, Professor Neuborne stated that Mr. Dubbin's objections were "the first and most influential on the issue of the insurance releases," and "Sam [Dubbin's] filing . . . held our feet to the fire." September 5, 2003 Response, at 9. The record clearly shows that the objection Mr. Dubbin filed on behalf of Dr. Weiss and the South Florida Holocaust Survivors Coalition was not "the first" or "the most influential" of the objections on the issue of insurance releases. And the quality and content of Mr. Dub-

bin's legal work, if any, acted as a flame retardant. Moreover, whatever Professor Neuborne may have said in an apparent effort to placate Mr. Dubbin, who was then appealing the fairness of the Settlement Agreement and the method of allocating funds to needy members of the Looted Assets Class, is irrelevant to my consideration of what impact Mr. Dubbin's work actually had on the renegotiation of insurance releases in this case. Passing over whether Professor Neuborne in fact made these two remarks, I am not moved from my position.

Mr. Dubbin similarly claims that after meeting with me and Professor Neuborne, "it was understood that [he] would be compensated initially for all of [his] time expended on the insurance issues." September 5, 2003 Response, at 2. I frankly do not know on what basis Mr. Dubbin "understood' this. I always regarded the Dubbin/Weiss fee application as an outrage, and Mr. Dubbin knew it. Moreover, I could not possibly have agreed to compensate him "for all of [his] time expended on the insurance issues" without knowing how much time that was. I never made any commitments to Mr. Dubbin, and if Professor Neuborne led him to believe that some compensation for time spent on insurance claims would be forthcoming, such statements were clearly not binding on me. Nor could they have prejudiced Mr. Dubbin, who seems to think that he did me a favor by breaking out the lodestar attributable to his work on insurance releases from his "hybrid" fee request related to insurance and allocation issues.

Alternatively, Mr. Dubbin argues that Second Circuit law demands that he be compensated because I adopted his objection. He cites for this proposition *White v. Auerbach*, 500 F.2d 822 (2d Cir.1974), a case where the final settlement clearly "embodied alterations urged by appellants in their objections to the first proposal," but where

the extent of the objections' influence on the Judge was "simply not clear" because the judge who presided over the settlement had passed away. *Id.* at 822. This case is easily distinguished, of course, because I am perfectly able to remember what influence Mr. Dubbin's objections had on my decisions and because the amendment to the Settlement Agreement as it related to insurance companies did not "embod[y] alterations urged by" Mr. Dubbin. Indeed, the thrust of his complaints were that Swiss insurance companies cloaked assets or dealt in assets looted by the Nazis, a complaint that had nothing to do with the insurance companies' liability for unpaid policies addressed in the amendment to the Settlement Agreement. The amendment did not affect in any way the releases given to insurance companies as they related to looted or cloaked assets.

Still, Mr. Dubbin relies on the fact that in *Auerbach*, the Second Circuit indicated as follows:

> [T]he case is similar to *Green v. Transitron Electronic Corporation*, 326 F.2d 492, 498–499 (1st Cir.1964), wherein the district court had denied an allowance to an objector's counsel on the ground that the court was aware of the problem prior to the time when the objection was made. The Court of Appeals noted that at the time of the objection 'none of the court's misgivings were a matter of record,' and held that it was 'unfair to counsel when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is openly adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while.' 326 F.2d at 499.

Id. at 829. Again, this case is wholly different. In *Green*, the objections were filed in a timely manner by someone working at the invitation of the court. 326 F.2d at 499. Here, Mr. Dubbin's objections were filed late and on a volunteer basis, and were not specifically adopted. As I explained, I asked Professor Neuborne to renegotiate the insurance releases because of a legal defect in the releases that Mr. Dubbin never raised, not because insurance companies had engaged in more nefarious activity than the parties initially believed. Specifically, as previously observed, it was apparent that the beneficiaries of insurance policies were not receiving any direct benefit for these insurance company releases and that there was not sufficient notice to potential claimants whose relatives may have had insurance policies in Swiss insurance companies. In other words, the beneficiaries of policies were giving up legal rights in exchange for no consideration and without adequate notice on that score. I do not contend that I was "thinking along that line all the while," but I was certainly "thinking along that line" by the time of Mr. Dubbin's late objection that did not even cite to these defects.

Even if I were to find that Mr. Dubbin's work contributed some material benefit to the amendment of the Settlement Agreement, I would not be able to accept his fee request. In May 2002, shortly after Mr. Dubbin filed his initial motion for fees, Robert Swift responded on behalf of the Plaintiffs Executive Committee. *See* Objection to the Verified Motion of Dubbin & Kravetz, LLP for Attorneys' Fees and Reimbursement of Expenses, dated May 13, 2002; Objection to the Verified Motion of Thomas Weiss, M.D. for Attorneys' Fees and Reimbursement of Expenses, dated May 31, 2002. Mr. Swift described Mr. Dubbin's fee request as "shocking," and his filing on behalf of Dr. Weiss as "surreal." *Id.* I agree.

A brief examination of the break-down of Mr. Dubbin's time spent in the insurance releases aspect of this case reveals how outlandish his request was. Mr. Dubbin has argued that "the law does not support the disaggregation of the attorneys' time when the firm's effort produced a material benefit for the class." Sept. 5, 2003, at 14 (citing *Dubin v. E.F. Hutton Group, Inc.*, 878 F.Supp. 616 (S.D.N.Y.1995)). Although I need not address the issue here because there was no "material benefit for the class," I do not I agree with the premise that "disaggregation of the attorneys' time" is inappropriate in the context of this fee application. Accordingly, I proceed to a "disaggregation" of Mr. Dubbin's time.

Again, Mr. Dubbin initially sought a lodestar award of $550,318, $95,000 in expenses, and a lodestar enhancement. Professor Neuborne broke down this request as follows:

> The lodestar, calculated on the basis of a $425 hourly fee that Mr. Dubbin claims to charge in general practice, includes $403,705 attributable to insurance issues at the trial level; $89,250 attributable to insurance aspects of the fairness and allocation appeals pursued by Mr. Dubbin; and $57,163 attributable to responses to objections filed to his materials during the summer of 2000 [though Mr. Dubbin claims that this was in fact for work done in 2002]. Of the $403,705 attributable to insurance issues, Mr. Dubbin estimates that $175,000 is attributable to pursuing the personal insurance claim of his client Dr. Thomas Weiss, against Generali.

Supplemental Neuborne Declaration, at 2. As Professor Neuborne argued, it is hard to see why the settlement class in this case should be asked to pay $175,000 for expenses in connection with Dr. Weiss's claim against

Generali—an Italian insurance company not included in this case or released by the original Settlement Agreement—particularly because the vast bulk of any research was performed by Dr. Weiss himself. Removing that sum reduced the original lodestar to $375,318. Similarly, it is incredible that Mr. Dubbin seeks fees related to his appeal, later withdrawn, from my judgment approving the Settlement Agreement. The ultimately withdrawn appeal, which I have already explained was nothing more than an at-tempted "hold-up" utilizing a challenge to a judgment that he now describes glowingly, accomplished nothing for insurance claimants. Professor Neuborne systematically addressed Mr. Dubbin's charges in connection with appeals, responses to objections in the summer of 2000, and "reconstructed time" for which Mr. Dubbin could not specifically account. *See* Supplemental Neuborne Declaration, at ¶¶ 3–5. The result is a swift reduction of Mr. Dubbin's lodestar to $129,455. I adopt this analysis without repeating it, and it would apply similarly to Mr. Dubbin's modified request. Indeed, Mr. Dubbin himself has now withdrawn his request for compensation for these three categories. *See* Modified Fee Request, at ¶ 4. The only place I differ with Professor Neuborne is in the final analysis. He argues that only 50% of this remaining lodestar reflected work that was necessary or could arguably have created a benefit. As I have explained, the more honest response is that none of Mr. Dubbin's work was necessary or had such an effect.

Part of Mr. Dubbin's rationale for his outlandish fee request is apparently his belief that, "Counsel's intervention on his Clients' behalf was indeed fraught with tremendous economic risk because it challenged the accepted wisdom of the elites of the class action bar, several major Jewish organizations, and the Govern-

ments of the United States and Switzerland." Fees Motion, at 11. But there was no great "risk" here. Mr. Dubbin relied on research that had been done by Dr. Weiss for a separate litigation and converted it into a sloppy and untimely objection in this case. It is as if he had bought one raffle ticket and decided to enter it in a second drawing. That is not risky and does not warrant compensation.

All told, Mr. Dubbin had a hand in submitting two things relevant to the insurance releases in this case: Five minutes of redundant and irrelevant testimony at the fairness hearing, and a three-month-late objection to the Settlement Agreement. Neither of these actions required new research, shed new light on the issues in this lawsuit, or added anything to the work of Dr. Weiss, who no longer seeks a fee. In short, they were worthless.

CONCLUSION

Mr. Dubbin's motion for attorney's fees is rejected. While he may have expended considerable time in connection with this case, that time was neither necessary nor helpful to the plaintiffs' class. More to the point, it does not deserve compensation from the settlement fund.

SO ORDERED.

Appendix L

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 04–1898–CV(L), 04–1899–CV(CON)

Argued: May 16, 2005 Decided: Sept. 9, 2005

IN RE HOLOCAUST VICTIM ASSETS LITIGATION

Samuel J. Dubbin,

Plaintiff–Appellant,

Pink Triangle Coalition, Karl Lange and Pierre Seel,

Interested Parties–Cross–Appellants,

—v.—

Union Bank of Switzerland, Swiss Bank Corp., also known as Swiss National Bank, Banking Institutions #1–100, John Does #1–100, Certain Swiss Bank Accounts described as follows, Swiss Bankers Assoc., Swiss Bankers Association and Bank of International Settlements,

Defendants–Appellees,

Plaintiffs' Executive Committee Settlement Class,

Interested–Party–Appellee,

Judah Gribetz,

Special Master,

Jacob Friedman, Estelle Sapir and Miriam Stern, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

World Jewish Restitution Organization, South Florida Holocaust Coalition and Thomas Weiss,

Intervenor–Plaintiffs,

Washington State Insurance Commissioner, Gregory Tsvilichovsky, Matvey Yentus, Sofiya Bloshteyn, Olga Tsvilikhovskya, Larisa Ryabaya, Rosa Yentus, Pavel Aronov, Lubov Starodinskaya and Eliazar Bloshteyn,

Interested–Parties,

Polish American Defense Committee, Inc., a non-profit California Corporation, Irving Wolf, Disability Rights Advocates and Director of International Affairs and Representative to the United Nations of Agudath Israel World Organization,

Movants,

G.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, L.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, F.K., a Holocaust Survivor and member of the New American Jewish Club of Miami, Holocaust Survivors Foundation USA, Inc. (HSF), David Schaecter, individually and as President of the Holocaust Survivors Foundation–USA, Inc., Leo Rechter, individually and as President of the National Association of Jewish Holocaust Survivors (NAHOS), National Association of Jewish Holocaust Survivors (NAHOS), David Mermelstein,

individually and as President of the New American Jewish Club of Miami and President of the South Florida Holocaust Survivors Coalition, New American Jewish Club of Miami, South Florida Holocaust Survivors Coalition, Alex Moskovic, individually and as President of the Child Survivors/Hidden Children of the Holocaust, Inc., Child Survivors/Hidden Children of the Holocaust, Esther Widman, individually as member of the National Association of Jewish Holocaust Survivors (NAHOS), Fred Taucher, individually and as President of the Survivors of the Holocaust Recovery Project (SHARP), Survivors of the Holocaust Recovery Project (SHARP), Nesse Go-din, individually and as President of the Jewish Holocaust Survivors and Friends of Greater Washington, Jewish Holocaust Survivors and Friends of Greater Washington, Henry Schuster, individually and as President of the Holocaust Survivors Group of Southern Nevada, Holocaust Survivors Group of Southern Nevada, Herbert Karliner, individually and as a member of the Holocaust Survivors Foundation–USA, Inc. and the South Florida Holocaust Survivors Coalition, Lea Weems, individually and as President of the Houston Council of Jewish Holocaust Survivors, Houston Council of Jewish Holocaust Survivors, Sam Gasson, individually and as President of the Habonim Cultural Club, Survivors of the Holocaust, Habonim Cultural Club, Survivors of the Holocaust, Holocaust Survivors of South Florida, Dena Axelrod, individually and as a member of the Child Survivors of the Holocaust, South Florida Group and the South Florida Holocaust Survivors Coalition, Saul Birnbaum, individually and as President of the Holocaust Survivors Club of Boca Raton (Century Village), Holocaust Survivors Club of Boca Raton (Century Village), Miriam Rubin, Individual Holocaust Survivor, Doris Fedrid,

Individual Holocaust Survivor, Helga Gross, Individual Holocaust Survivor, National Federation of the Blind, USA, German Council of Centers for Self–Determined Lives, Finist, Russia, Equal Ability Limited, United Kingdom, Through the Looking Glass, USA, Disabled Persons International, Canada, World Institute on Disability, USA, Center for Independent Living, Bulgaria, Disability Rights Education and Defense Fund, US, Center for Independent Living, Berkeley, USA, California Foundation for Independent Living Center, Independent Living Resource Center, San Francisco, Computer Technologies Program, USA, Ragged Edge/Avocado Press, USA, Legal Advocacy for the Defense of People with Disabilities, National Confederation of Disabled Persons, Greece and De juRe Alapitvany, Hungary,

Appellants.

Edward Labaton, Goodkind Labaton Rudoff & Sucharow, LLP, New York, NY (Arthur J. England, Jr., Charles M. Auslander, and Brenda K. Supple, Greenberg Traurig, P.A., Miami, FL; Samuel J. Dubbin, Dubbin & Kravetz, LLP, Coral Gables, FL; Stephen Burbank, Philadelphia, PA, of counsel) *for Appellants.*

Burt Neuborne, New York, NY, and Robert A. Swift, Kohn Swift & Graf, PC, Philadelphia, PA (Melvyn I. Weiss, Deborah M. Sturman, Milberg Weiss Bershad & Schulman LLP, New York, NY; Morris A. Ratner, Caryn Becker, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY) *for Appellees.*

Before:

MESKILL, NEWMAN, and CABRANES,
Circuit Judges.

JOSÉ A. CABRANES, *Circuit Judge.*

Samuel J. Dubbin appeals from a March 31, 2004 memorandum and order of the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) denying his request for attorney's fees in connection with the settlement of the litigation styled as the Holocaust Victim Assets Litigation. *See In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d 363 (E.D.N.Y.2004). Dubbin's principal claim to attorney's fees rests on his purported contributions to an amendment to the settlement agreement that modified releases granted to Swiss insurance companies. In a comprehensive published opinion, the District Court analyzed, and ultimately rejected, Dubbin's fee request on the ground that his contributions were "late, tangential, and ultimately irrelevant." *Id.* at 378. We affirm.

BACKGROUND

This appeal was consolidated with an appeal from the District Court's settlement allocation and distribution orders brought by, *inter alia*, Holocaust Survivors Foundation–U.S.A., Inc. ("HSF"), an entity represented by Dubbin. We adjudicate the HSF's appeal in a separate opinion, *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir.2005), which summarizes the claims underlying the Holocaust Victim Assets Litigation and its procedural history. We assume familiarity with that

summary and highlight here only those background events directly relevant to this appeal.

The settlement agreement signed by the parties on January 26, 1999 would have had the effect of releasing Swiss insurance companies (with three specific exceptions) from liability for certain Holocaust-related claims. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 365. On May 10, 1999, the District Court set an October 22, 1999 deadline for comments on the settlement agreement. *In re Holocaust Victim Assets Litig.*, No. 96–4849, slip op. at 4 (E.D.N.Y. May 10, 1999) (scheduling order). Only one of the 200 timely submissions specifically addressed the insurance releases—an October 20, 1999 objection by Washington State Insurance Commissioner Deborah Senn. Commissioner Senn principally argued that

> [t]he proposed settlement is unfair to insurance policyholders and beneficiaries. It releases all claims against all Swiss insurers and reinsurers [with three exceptions]. There has been no public review of their records to determine their unpaid Holocaust policies or their value. These companies may be released from many millions of dollars of wrongfully unpaid claims in exchange for relatively *de minimis* payments to policyholders or their heirs. Class members are required to decide whether to opt out of the class without even being told whether they or a family member were covered by policies or the face amount of such policies, although this information may be in the possession of the settling companies. The proposed settlement undermines the Inter-national Commission on Holocaust Era Insurance Claims ["ICHEIC"] whose protocols provide for identification, valuation and payment of policies.

Commissioner Senn's concerns were echoed in a November 18, 1999 letter by Lawrence S. Eagleburger, the Chairman of the ICHEIC and former U.S. Secretary of State.

Only on November 24, 1999—more than a month after the deadline for objections, and well after the District Court had received the submissions of Commissioner Senn and Secretary Eagleburger—did Thomas Weiss, who was then represented by Dubbin, send a letter to the Court regarding the insurance company releases. This letter reads, in its entirety:

> Dear Judge Korman,
>
> It was brought to my attention that the Swiss bank settlement of $1.25 billion releases the Swiss insurance companies [with three exceptions] from any further liability. This is completely unacceptable, as many Swiss insurance companies acted as cloaking agents for Munich [Reinsurance] of Germany during WWII. U.S. military and intelligence/legal documents from 1944–47 state this explicitly and charge Munich [Reinsurance] with criminal activity. Additionally, this surreptitious inclusion of these companies is not known to the general survivor community. Your assistance to remove this inappropriate blanket amnesty for the Swiss insurance industry is vital.
>
> The Bergier[ ] report states that the amount that the Swiss owe regarding stolen WWII gold may exceed six billion dollars. The documents further state that although the Swiss banking industry stopped receiving gold at a point before the end of the war (as a result of Treasury Secretary Henry Morganthau's admonition that there will be a day of reckoning) the Swiss insurance industry continued receiving

> stolen gold up to the last days of the war. Justice demands that the Swiss insurance industry not escape its responsibility.
>
> Sincerely,
>
> [signed]
>
> Thomas Weiss, MD

Dubbin made substantially the same points in an oral statement during a November 29, 1999 fairness hearing before the District Court. In the main, he cautioned the Court against "a blanket release of unnamed and unidentified companies, which we know from evidence in the archives may well have been beneficiaries of looted Jewish assets through the access in Nazi insurance trusts, without being even identified or held to account in any way, shape or form for what their responsibilities are." Dubbin added:

> I know that Commissioner [Senn] in the State of Washington and Chairman [Eagleburger] have brought this question to the Court's attention. But particularly in light of some of the documents we have found, we felt on behalf of the Florida survivor community and Dr. Weiss in particular, we would urge you—and I know [the Lead Settlement Counsel, Professor Burt] Neuborne said if we have any problems with the settlement, please bring them to his attention.
>
> I don't know what benefit accrues to survivors from what may be a big surprise at the end of the road, when we find out some of the companies not even identified today being released could well be

> as culpable as some of the ones who we've been talking about all these years. Thank you very much.

In a December 22, 1999 conference that followed the fairness hearings, the District Court instructed the Lead Settlement Counsel to renegotiate the releases of Swiss insurance companies. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 370.

On January 31, 2000, approximately six weeks after the Lead Settlement Counsel received this charge from the District Court (and three months after the deadline for comments on the original settlement agreement), Dubbin filed a written objection to the settlement agreement. The objection principally criticized the "broad inclusion of Swiss insurers, and, thereby, claims for unpaid insurance policies under the umbrella of this litigation."

In May 2000, the parties to the class action agreed to amend the settlement agreement in a manner that addressed the District Court's concerns regarding the insurance company releases. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 373. The amended settlement agreement designated an amount of up to $100 million—including up to $50 million provided by the insurance companies—for the resolution of unpaid insurance claims. *Id.* at 373–74. In a memorandum and order dated July 26, 2000, the District Court approved the amended settlement agreement. *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 160 (E.D.N.Y. 2000). Its final order approving the agreement was entered August 9, 2000.

Dubbin subsequently informed the District Court of his intention to appeal, on behalf of Weiss, the approval of the amended settlement agreement. *See In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 374–75. The

Court met with Dubbin and Weiss to discuss their concerns, and it subsequently described what transpired:

> After the discussion appeared to be going nowhere, Dr. Weiss asked how much I would pay to prevent them from filing a notice of appeal. Specifically, he wanted me to provide attorneys fees and funds for private research that would assist him in his litigation against [the Italian insurance firm] Generali. This was beyond the pale. I was not going to be blackmailed, particularly with funds that belong to Holocaust survivors.

Id. at 375. Dubbin then filed a notice of appeal on Weiss's behalf, but eventually withdrew it without filing a brief. Other parties, however, appealed from the District Court's order approving the amended settlement agreement. We affirmed. *See In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir.2001).

Dubbin then submitted a fee application seeking a total of $5.9 million—$3.6 million for himself and approximately $2.3 million for Weiss. *See In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 364 (quoting *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 116–17 (E.D.N.Y.2004)). This request was " 'almost equal to the total amount of legal fees awarded to those counsel who were compensated for their role in obtaining the *$1.25 billion* settlement with the Swiss banks.' " *Id.* (emphasis added). Of the total fees requested, $2.9 million ($600,000 for Dubbin and $2.3 million for Weiss) was sought in connection with the amended releases of Swiss insurance companies. *See id.* After the District Court first addressed the merits of these requests on March 9, 2004, *see In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 118, the amount of these requests "substantially diminished." *In re Holocaust Vic-*

tim Assets Litig., 311 F.Supp.2d at 364. Indeed, Weiss withdrew his request entirely. *Id.* Dubbin decreased his request multiple times, eventually seeking fees of $309,051 and expenses of $41,318. *Id.*

In a memorandum and order dated March 31, 2004, the District Court denied Dubbin's fee request in its entirety. *Id.* In the course of doing so, the Court provided a detailed factual account of the chain of events that precipitated its request for a renegotiation of insurance releases. It underscored, first, the significance of the objections raised by Commissioner Senn and Secretary Eagleburger. *Id.* Although "the thrust of the Senn and Eagleburger objections was on maintaining the ongoing viability of ICHEIC—something not ultimately relevant to the decision to amend the Settlement Agreement"—these objections "caused [the Court] to focus on the validity of the insurance releases." *Id.* Importantly, the District Court found that its attention had been drawn to the insurance releases *before* it received Weiss's November 24, 1999 letter. *Id.*

Once Weiss's letter arrived—over a month after the deadline for submitting formal objections—the District Court summarized its significance as follows:

> The letter itself stated little more than a general notion that the insurance companies had done wrong and that releasing them was therefore inappropriate. More to the point, the letter did not address the actual defect in the insurance releases, focusing instead on the extent to which Swiss insurance companies engaged in cloaking assets. Whether a company cloaked—that is, hid—assets on behalf of the Nazis is wholly irrelevant to a claimant who is seeking to recover from an insurance company for a policy once held by a victim of Nazi persecution.

Id. at 368.

The District Court further found that Dubbin's statement at the November 29, 1999 fairness hearing merely "elaborate[d] on the letter his client had sent [the Court] a week earlier . . . and added nothing to the legal arguments that Commissioner Senn had already advanced in a timely fashion." *Id.* at 369.

Following the fairness hearing, the District Court took the following actions:

> [C]oncerns that had been brewing led [the Court] to call a conference with the parties. After the parties had a time to prepare, [the Court] held a conference on December 22, 1999, some three weeks after the fairness hearing. One of the purposes of the meeting, as recorded by Deputy Special Master Shari Reig, was to "discuss[ ] the two key issues that Judge Korman has made it clear he wants to resolve prior to ruling on the fairness of the settlement—art and insurance." In the end, [the Court] insisted that the insurance releases be renegotiated not because Swiss insurance companies had cloaked assets or engaged in other wrongdoing unrelated to avoiding payment of insurance policies issued to victims of Nazi persecution. Rather, [the Court] was concerned with the straightforward legal point that, as originally drafted, the insurance releases were unenforceable because Swiss insurance companies were released from claims by beneficiaries or heirs who were not receiving any direct and distinct benefit for these releases. In addition, these potential claimants were not adequately informed that their claims were being released. . . .
>
> . . .
>
> By the time of the December 22, 1999 meeting, [the Court] had become convinced that the insur-

> ance releases were unenforceable as drafted. Indeed, when [the Court] eventually approved the amended settlement, [the Court] wrote: "[I]f the carriers do not reaffirm [the amended insurance releases], I will issue a supplemental decision on the enforceability of the original insurance releases." [The Court] was prepared to hold them unenforceable as violating the consideration requirement of *[National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir.1981)]. This legal defect is why [the Court] asked Professor Neuborne to reenter negotiations. It had nothing to do with the five minutes of testimony Mr. Dubbin had presented at the fairness hearing. If any submission is to be credited for opening this reconsideration, it is that of Commissioner Senn, who in a *timely fashion* pointed out that there was a problem with the "*de mini mis*" return class members were going to receive from the insurance releases and the general insufficiency of the notice.

Id. at 370–71 (citations omitted) (emphasis in original).

The Court then summarized Dubbin's contributions to the settlement agreement as follows:

> First, he submitted nothing prior to the deadline for written objections to the Settlement Agreement and nothing prior to the fairness hearing. Second, Mr. Dubbin spoke briefly at the fairness hearing repeating the sentiments and research of his client, expressing his approval of objections that had been filed in a timely matter by other individuals, and adding his concern that many Swiss insurance companies engaged in cloaking assets. Third, Mr. Dubbin filed a largely irrelevant written objection based on research by his client three months late and six

> weeks after [the Court] had decided that the insurance releases were unenforceable. Fourth, Mr. Dubbin stood by as his client attempted to extort a significant cash award from a fund belonging to Holocaust survivors in exchange for not filing a notice of appeal from [the Court's] judgment approving the fairness of the settlement. And fifth, Mr. Dubbin filed that notice of appeal. For this, he initially sought $600,000, and now seeks $309,051 in fees plus $41,318 in disbursements.

Id. at 375. The District Court found these contributions "worthless," and denied Dubbin's fee request. *Id.* at 382.

Dubbin now appeals from this decision.

DISCUSSION

Under the "common fund doctrine," a party that secured "a fund for the benefit of others, in addition to himself, may recover his costs, including his attorney's fees, from the fund itself or directly from the other parties enjoying the benefit." *Savoie v. Merchants Bank*, 84 F.3d 52, 56 (2d Cir.1996). The actions of the party seeking to recover costs must, however, be "a substantial cause of the benefit obtained." *Id.* at 57. Dubbin agrees, as he must, that "a material benefit to the class is the *sine qua non* for an attorney's entitlement to an award of fees from the common fund." Appellant's Br. at 30. The District Court concluded that Dubbin's contributions failed to offer any material benefit to the class. We agree.

We review the District Court's denial of attorney's fees for an abuse of discretion. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47–48 (2d Cir.2000). "A district court 'abuses' or 'exceeds' the discretion accorded to it

when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir.2001) (footnotes omitted).

It merits underscoring that " 'abuse of discretion'—already one of the most deferential standards of review— takes on special significance when reviewing fee decisions." *Goldberger*, 209 F.3d at 47. "[T]he district court, which is intimately familiar with the nuances of the case, is in a far better position to make [such] decisions than is an appellate court, which must work from a cold record." *In re Bolar Pharm. Co. Sec. Litig.*, 966 F.2d 731, 732 (2d Cir.1992).

Upon careful review of the record ~~of~~ this case, we conclude that the District Court acted well within its discretion in finding (1) that the renegotiation of the Swiss insurance company releases was initiated well before Dubbin submitted his formal objection on January 31, 2000; (2) that the decision to renegotiate these releases was triggered by the Senn and Eagleburger objections, rather than by Weiss's November 24, 1999 letter or by Dubbin's November 29, 1999 statement at the fairness hearing; and (3) that, in any event, "the amendment to the Settlement Agreement as it related to insurance companies did not embody alterations urged by Mr. Dubbin." *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d at 380 (alterations omitted). We thus find no support for Dubbin's contention that his participation substantially contributed to the insurance-related amendments to the settlement agreement.

In his appellate brief, Dubbin retreats to the position that even counsel who have not increased "the monetary value of a settlement" may nonetheless receive attorney's fees if "they sharpen the focus of settlement issues and provide important insights shaping the settlement." Appellant's Br. at 31. Assuming *arguendo* that this position is accurate as a matter of law, nothing in the record of this case or in the findings of the District Court indicates that Dubbin's contribution has crossed even this reduced threshold.

Dubbin further claims that he is entitled to attorney's fees on the basis of his January 31, 2000 written objection to the original settlement agreement despite the fact that the District Court had requested amendments to that agreement six weeks *before* Dubbin's submission was filed. Relying on two decisions—*White v. Auerbach*, 500 F.2d 822 (2d Cir.1974), and *Green v. Transitron Electronic Corp.*, 326 F.2d 492 (1st Cir.1964)—Dubbin asserts that he is entitled to compensation because the District Court's intention to pursue the amendment was not "revealed" until after he filed his January 2000 objection. Appellant's Br. at 39.

The cases on which Dubbin relies are inapplicable here. In *White*, we emphasized that "[o]rdinarily the trial judge has broad discretion in deciding whether, and in what amount, attorneys' fees should be awarded, since he is in the best position to determine whether the participation of objectors assisted the court and enhanced the recovery." 500 F.2d at 828. In that case, however, we faced "an unusual situation in that the district judge who passed on the applications for attorneys' fees did not preside over the proceedings which formed the basis for the applications," because the judge who presided over the latter proceedings had died. *Id.* at 826. Here, by contrast, Chief Judge Korman presided over both the set-

tlement and the fee application, and his assessments of Dubbin's contributions should therefore be accorded deference.

In *Green*, the First Circuit held that it is "unfair to counsel when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is ultimately adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while." 326 F.2d at 499. There are, however, at least three salient differences between Dubbin's fee application and that of the attorneys in *Green:* (1) unlike Dubbin, those attorneys were "not [ ] volunteer[s] but came in at the invitation of the court," *id.;* (2) Dubbin's legal argument was not, in fact, "adopted by the court"; and (3) Dubbin could hardly have had a reasonable expectations that the labor he invested into his substantive filing would be compensated once he had missed the Court's deadline by three months.

CONCLUSION

We have carefully considered all of Dubbin's arguments and we find each of them to be without merit. Accordingly, the District Court's memorandum and order of March 31, 2004 is hereby affirmed.

Appendix M

Judah Gribetz
Special Master
Holocaust Victim Assets Litigation
Case No. CV 96-4849
399 Park Avenue
New York, NY 10022
Phone: (212) 705-7221
Fax: (212) 750-9022

April 24, 2006

Hon. Edward R. Korman
Chief Judge
United States District Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Dear Judge Korman:

At your request, we provide below updated information concerning the distributions and/or allocations that have been made to class members, thus far, from the $1.25 billion Settlement Fund. This information also is summarized in the accompanying chart (Swiss Banks Settlement Fund Distribution Statistics as of April 20, 2006) which provides data concerning total amounts paid, and number of claimants paid, by class.

As of April 20, 2006, a total of $875,502,616 has been distributed or allocated to all class members. Specifically, the following amounts have been distributed or allocated:

- **Deposited Assets Class:** A total of $374,545,141 has been approved to date for distribution or allocation to members of the Deposited Assets Class. This sum is comprised of the following amounts:

1. $291,360,649 has been approved for payment under the CRT-II process. CRT-II, which operates in Zurich under the Court's authority, reviews Deposited Assets claims and recommends that the Court issue awards where it determines that one or more Holocaust-era Swiss bank accounts belongs to claimant(s) based upon the CRT's analysis of the bank account documentation made available by Swiss banking authorities. Thus far, 3,674 Holocaust victims or heirs have been approved to receive awards under the CRT-II process for the return of Swiss bank accounts. A total of 2,011 awards have been made and 3,277 accounts have been awarded (a number higher than the total number awards, because many Account Owners held more than one account). Excluding one award in the amount of approximately $22 million approved in April 2005, the average award to date has been $134,080. The average account value to date has been $82,265 (excluding the foregoing $22 million award).

2. $18,184,492 was approved under the CRT-I process, paid for by the Settlement Fund in accordance with the terms of the Settlement Agreement. CRT-I adjudicated claims to Holocaust-era Swiss bank accounts prior to the creation of the Settlement Fund. Of the foregoing amount, $12,171,691 was paid pursuant to an agreement between Class Action plaintiffs and defendants, an amount which was paid by the defendant Swiss banks and reimbursed by the Escrow Fund or Settlement Fund. The balance of $6,012,802 represents direct payments to

CRT-I claimants paid by the Escrow Fund or Settlement Fund.

3. $10,525,000 has been approved by the Court for payment to 2,105 claimants who have satisfied certain criteria and thereby demonstrated that they have plausible undocumented claims to Holocaust-era Swiss bank accounts. The claims have been reviewed by the New York-based Swiss Deposited Assets Program of the CRT (CRT-NY). *See* Orders of February 17, 2006 and March 29, 2006.

4. Approximately $54,475,000 is expected to be approved by the Court for payment to approximately 11,000 additional claimants based upon their plausible undocumented claims to Holocaust-era Swiss bank accounts. The approximately 11,000 additional claims already have been reviewed by CRT-NY and have been determined to have satisfied the relevant criteria. The additional awards will be submitted to the Court for approval upon completion of certain administrative tasks, by no later than *August 2006. See* Order of February 17, 2006.

With respect to the geographic distribution of Jewish recipients of Deposited Assets Class awards under the CRT-II process as well as to those already approved in connection with the CRT-NY analysis of plausible undocumented claims, as of April 20, 2006, 10.1% of payments have been approved for class members in Israel; 40.9% of payments have been approved for those in the U.S., 0.1% of payments have been approved for those in the former

Soviet Union (FSU); and 49% o of payments have been approved for those in other countries.

- **Looted Assets Class:** $205 million has been distributed or allocated to humanitarian assistance programs serving needy Holocaust survivors. The program has been in operation since mid-2001 and is scheduled to continue through 2011 (tracking the approximately ten-year life expectancy estimated in 2000 to remain for the average Nazi victim). Of this amount, $184,500,000 has been distributed or allocated to programs serving needy Jewish Nazi victims, and another $20,500,000 has been distributed to programs serving needy Roma, Jehovah's Witness, homosexual and disabled Nazi victims; the latter program for the benefit of non-Jewish class members is now complete. Of the amount distributed or allocated to programs serving Jewish victims, $138,375,000 has been allocated over the ten-year program to needy Nazi victims in the former Soviet Union (FSU). Another $23,062,500 has been distributed or allocated to programs serving needy Jewish Nazi victims in Israel, while $23,062,500 has been distributed or allocated to programs serving needy Jewish Nazi victims in other parts of the world, including Central and Western Europe, the United States and elsewhere.

  As to payments, as of year-end 2006, $12,389,518 will have been approved for payment to needy Jewish Nazi victims in Israel (12.5% of Looted Assets Class payments made to Jewish class members thus far); $4,003,666 will have been approved for payment to needy Jewish Nazi victims in the United States (4%); $74,228,365 will have been approved for payment to needy Jewish Nazi victims in the

FSU (75%); and $8,349,602 will have been approved for payment to needy Jewish Nazi victims in other parts of the world (8.4%).

- **Slave Labor Class I:** $273,304,700 has been approved for payment to 188,486 former slave laborers for companies owned or operated by German entities. Each former slave laborer receives $1,450. Of the $273,304,700, $241,525,050 has been approved for payment to 166,569 Jewish Nazi victims and certain heirs, and $31,779,650 has been approved for payment to 21,917 Roma, Jehovah's Witness, homosexual or disabled Nazi victims and certain heirs.

  With respect to the geographic distribution of Jewish recipients of Slave Labor Class I payments, as of April 20, 2006, 47.6% of payments have been made to those in Israel; 22.8% of payments have been made to those in the U.S., 2.1% of payments have been made to those in the FSU; and 27.5% of payments have been made to those in other countries.

- **Slave Labor Class II:** $688,750 has been approved for payment to 475 former slave laborers for companies owned or operated by Swiss entities. As with Slave Labor Class I, each former slave laborer receives $1,450. Slave Labor Class II is not limited to the five "victim or target" groups specified in the Settlement Fund but, rather, is open to all Nazi victims. The vast majority of Slave Labor Class II awards have been approved for non-Jewish victims.

Refugee Class: $11,389,025 has been approved for payment to 4,071 survivors and certain heirs. Of this amount, $10,650,250 has been approved for

payment to 3,858 Jewish survivors and certain heirs based upon the denial of entry or expulsion from Switzerland (each of whom receives $3,625), or admission into Switzerland but mistreatment there (each of whom receives $725). Another $738,775 has been approved for payment to 213 Roma, Jehovah's Witness, homosexual or disabled Nazi victims who were denied entry or expelled (again, each of whom receives $3,625), or admitted but mistreated (each of whom receives $725).

With respect to the geographic distribution of Jewish recipients of Refugee Class payments, 23.4% of payments have been made to those in Israel; *41.2%* of payments have been made to those in the U.S., 0.1% of payments have been made to those in the former Soviet Union (FSU); and 35.3% of payments have been made to those in other countries.

To summarize all *distributions and allocations* from the Settlement Fund to Jewish class members to date: (1) class members in Israel have been approved to receive 23% of all distributions or allocations; further, some additional percentage of forthcoming plausible undocumented awards under the CRT-NY program also will be made to individuals residing in Israel; (2) class members in the United States have been approved to receive 25.8% of all distributions and allocations, and an additional number shortly will receive payments based upon plausible undocumented claims to Deposited Assets; (3) class members in the FSU have received 19.4% of all payments or allocations, the bulk of which consists of the Looted Assets Class allocations that are to be distributed over a ten-year period in total; and (4) class members in other parts of the world have received 31.7% of all distributions and allocations, and an additional number

shortly will receive payments based upon plausible undocumented claims to Deposited Assets.

As for *distributions* from the Settlement Fund to Jewish class members as of December 31, 2006 (i.e., excluding future Looted Assets Class allocations committed through 2011): (1) class members in Israel will have received 24.5% of all payments; (2) those in the United States will have received 28.6%; (3) those in the FSU will have received 12.2%; and (4) those in other parts of the world will have received 34.7%.

Finally, in addition to the programs described above, as the Court is aware, $10 million of the $1.25 billion Settlement Fund (less than 1%) was reserved under the Distribution Plan for the Victim List Project. To date, the Court has authorized payments of $1.76 million to Yad Vashem - The Holocaust Martyrs' and Heroes' Remembrance Authority of Israel, and another approximately $1.14 million to the United States Holocaust Memorial Museum.

Respectfully submitted,

JUDAH GRIBETZ

Judah Gribetz, Special Master

SHARI C. REIG

Shari C. Reig, Deputy Special Master

cc: Prof. Burt Neuborne

Holocaust Victim Assets Litigation
Case No. CV 96-4849

Swiss Banks Settlement Fund Distribution
Statistics as of April 20, 2006

Totals as of April 20, 2006:

	Funds distributed or allocated	Approved Claimants
Deposited Assets Class	$374,545,141	≅ 16,674[1]
Looted Assets Class	$205,000,000	≅ 180,738[2]
Slave Labor Class I	$273,304,700	188,486
Slave Labor Class II	$688,750	475
Refugee Class	$11,389,025	4,071
Incentive Awards[3]	$575,000	7
Victim List Project[4]	$10,000,000	n/a
GRAND TOTAL:	**$875,502,616**	**≅ 390,451 claimants**

1. Deposited Assets **$374,545,141**

CRT-II

Documented Awards

Total Amount:	**≅ $291,360,649**	(through CRT Batch 96)
Total Awards:	2,011	
Total Accounts Awarded:	3,277	
Average Award:	$134,080[5]	
Average Account:	$82,265	

Plausible Undocumented Awards[6]

Approximate Allocation:	**$65,000,000**
Estimated Total Awards:	13,000
Award Amount:	$5,000

CRT-I

Total Amount: $18,184,492[7]

2. Looted Assets

$205,000,000 allocated to programs serving needy survivors

(JDC, Claims Conference and IOM):

Jewish:	$184,500,000
Non-Jewish (10%):	$20,500,000
Of Jewish Allocation:	
Former Soviet Union (75%):	$138,375,000
Rest of World (25%):	$46,125,000
Israel (50%)	$23,062,500
Rest (50%)	$23,062,500

3. Slave Labor I ($1,450 each)

$273,304,700 awarded for 188,486 Nazi victim claims approved

Claims Conference:

$241,525,050	for 166,569 Jewish Nazi victim claims approved	(through Tranche 24)

IOM:

$31,779,650	for 21,917 Roma, Jehovah's Witness, Homosexual and Disabled Nazi victim claims approved[8]	(through Group XVI)

4. <u>Slave Labor II</u>
<u>($1,450 each)</u>

$688,750	**awarded for 475 Nazi victim claims approved**[9]	(through Group XVI)

(IOM only)

5. <u>Refugees ($3,625</u>
<u>or $725 each)</u>

$11,389,025	**awarded for 4,071 Nazi victim claims approved**[10]	

Claims Conference:

$10,650,250	for 3,858 Jewish Nazi victim claims approved	(through Group 33)

IOM:

$738,775	for 213 Roma, Jehovah's Witness, Homosexual and Disabled Nazi victim claims approved	(through Group XVI)

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[9] This figure is comprised of: (1) 3,674 claimants approved for awards based upon documentary evidence obtained from Swiss banks and other sources, under the process administered in Zurich by the Claims Resolution Tribunal (CRT-II) under the authority of the United States District Court for the Eastern District of New York; (2) 2,105 claimants thus far approved to receive Deposited Assets Class awards based upon their plausible undocumented claims, under the CRT-II process administered in New York under the Court's authority; and (3) an estimated 10,895 additional claimants expected to receive awards based upon their plausible undocumented claims, which are expected to be submitted for review and approval by no later than August, 2006. See Order of February 17, 2006. There are also additional claimants who have received awards under the CRT-I claims process.

CRT-II also has recommended that the Court reject an additional 16,455 claims, consisting of (1) 837 denials, (2) 1,442 determinations of inadmissibility, and (3) 14,177 "No Match" Decisions. These terms are defined as follows:

(1) Denials are defined as claims that the CRT determines to be ineligible for awards. There are a variety of bases for such determinations: (a) the claimant's relative and the account owner are not the same individual, based upon information in the bank records and/or other sources ("identity" denials); (b) the available evidence indicates that the account was closed properly and the account owner received the proceeds ("disposition denials"); (c) the claimant is not entitled to the claimed account, whether due to the absence of a family relationship to the account owner or for other reasons ("entitlement" denials); and (d) the names) of the relative(s) claimed to have owned Holocaust-era Swiss bank accounts, and the names of account owners made available to the CRT by the Swiss banks or located via other sources, do not match ("no match" denials).

(2) Inadmissibility decisions are defined as claims that the CRT determines to be ineligible to participate in the Deposited Assets Class process. Under the terms of the Settlement Agreement, only the accounts of "Victims or Targets of Nazi Persecution" can be paid from the Settlement Fund. The Settlement Agreement defines "Victims or Targets of Nazi Persecution" as those who were, or were perceived to be, Jewish, Romani, Jehovah's Witness, disabled, or homosexual. Neither the CRT nor the Court has the authority, under the terms of the Settlement Agreement, to address Deposited Assets Class claims asserted on behalf of account owners who were not "victims or targets" as defined above.

(3) "No Match" Decisions are issued when the CRT determines that there are no accounts in the Account History Database (AHD) matching to names of account owners that have been provided to the CRT by the claimant. The AHD consists of 36,131 accounts identified during the investigation of Swiss banks by the Independent Committee of Eminent Persons (ICEP or the Volcker Committee) as probably or possibly belonging to victims of Nazi persecution, augmented to 37,373 by account information obtained by the CRT from other sources. The CRT uses advanced name matching systems and computer programs in conducting its matching analysis. Further, the CRT matches not only the names of persons specifically claimed to have owned a Swiss bank account, but the names of other family members identified by the claimant.

[2] Approximately 181,000 surviving Nazi victim have been compensated from the Settlement Fund through programs serving the neediest members of the Looted Assets Class. The figure is derived from the following three sources:

(1) Approximately 13,170 Jewish victims to date have been served by programs administered on the Court's behalf by the Conference on Jewish Material Claims Against Germany, Inc. (Claims Conference). See February 15, 2005 Letter of Greg Schneider, Claims Conference Chief Operating Officer, to Special Master Judah Gribetz, as well as attached statistical charts concerning the number of victims served from Jan. 1 to Dec. 31, 2004.

(2) Approximately 93,728 Jewish victims to date have been served by programs administered on the Court's behalf by the American Jewish Joint Distribution Committee (JDC). See "JDC Report on 2004 Welfare Programs for Jewish Nazi Victims in the Former Soviet Union," August 4, 2005 (JDC 2004 Report). Statistics concerning the number of victims served are set forth in the chart annexed to the JDC 2004 Report entitled "*Services Provided in the FSU in 2004 to Jewish Nazi Victims from the Swiss Bank Settlement Funds,*" "*# of* Nazi Victims Receiving Food Packages from the Settlement Fund." As the chart indicates, Court-funded programs reach a portion *of* the Nazi victims served by JDC programs in the FSU. All victims in the FSU served by the Court's programs receive food packages (93,728). Smaller numbers of victims may also receive other services such as medical assistance and emergency grants. (See Chart.)

(3) 73,840 non-Jewish victims (Roma, Jehovah's Witness, disabled and homosexual) were served by programs administered on the Court's behalf by the International Organization for Migration (IOM). See "Final Report on Assistance to Needy, Elderly Survivors of Nazi Persecution Humanitarian and Social Programmes", IOM-HSP 2006.

[3] $575,000 in payments were made to seven class members whom the Court determined provided "efforts [which] materially aided the plaintiff class." See, e.g., Memorandum & Order, December 4, 2002.

[4] The Court-approved Distribution Plan allocates $10 million to the Victim List Program (less than 1% of the $1.25 billion Settlement Fund). The intent of the Program is to collect and make widely available the names of all victims or targets of Nazi persecution, those who perished as well as those who survived. To date, $1.76 million has been allocated to the Yad Vashem Holocaust Martyrs' and Heroes' Remembrance Authority in Israel, and approximately $1.14 million to the United States Holocaust Memorial Museum.

[5] Due to the size of the Batch 75 award ($21,860,325.09), which relates to one account only, it is excluded from the calculation of the average award as well as the average account value.

[6] On February 17, 2006, Chief Judge Edward Korman of the United States District Court of the Eastern District of New York approved the first 105 plausible undocumented Deposited Assets Class claims for payment, and on March 29, 2006, he approved an additional 2000 such awards. Each such plausible undocumented award is the amount of U.S. $5,000.00. The total amount expected to be distributed to members of the Deposited Assets Class with plausible undocumented claims is approximately $65 million, based upon the information provided to the Court by CRT-NY that approximately 13,000 claims are eligible for payment. As noted previously, it is expected that by the end of August, 2006, CRT-NY will have submitted, for review and approval, the remainder of the eligible claims.

[7] In reconciling payments of CRT awards by the Escrow and Settlement Funds through 2005, the Settlement Fund's accountants advised that an aggregate of $18,184,492 in CRT-I awards had been paid. Of this amount, $12,171,691 of CRT-I awards were paid pursuant to an agreement between Class Action plaintiffs and defendants. This sum was paid by the banks and reimbursed by the Escrow Fund or the Settlement Fund. The balance of $6,012,802 represents direct payments to CRT-I claimants paid by the Escrow Fund or the Settlement Fund.

[8] This includes four IOM claims approved upon appeal. See Order dated February 2, 2006. In addition, the IOM has recommended that the Court reject 14,497 Slave Labor Class I claims because the claimants did not plausibly demonstrate that they satisfied the relevant criteria as set forth in the Distribution Plan and subsequent implementation orders.

[9] The IOM also has recommended that the Court reject 14,987 Slave Labor Class II claims because the claimants did not plausibly demonstrate that they satisfied the relevant criteria as set forth in the Distribution Plan and subsequent implementation orders.

[10] In addition to the claims approved for payment cited herein, another 2,123 Refugee Class claims have been recommended for rejection by the Claims Conference (1,354) and IOM (769), respectively, because the claimants did not plausibly demonstrate that they satisfied the relevant criteria as set forth in the Distribution Plan and subsequent implementation orders.

(5)

No. 05-1275

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

HOLOCAUST SURVIVORS FOUNDATION USA, INC., ET AL.,

Petitioners,

—v.—

UNION BANK OF SWITZERLAND, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

BURT NEUBORNE
Counsel of Record
40 Washington Square South
New York, New York 10012
(212) 998-6172

Lead Settlement Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 05-1275

HOLOCAUST SURVIVORS FOUNDATION USA, INC. *ET AL.*,

Petitioners

v.

UNION BANK OF SWITZERLAND, ET AL.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 15.8, Respondents respectfully submit this Supplemental Brief in Opposition in order to bring to the Court's attention a serious anomaly in the Reply Brief in Support of the Petition dated May 31, 2006.

I.

PETITIONERS HAVE CONSISTENTLY SUPPORTED THE USE OF THE CY PRES DOCTRINE TO PROVIDE ASSISTANCE TO NEEDY HOLOCAUST SURVIVORS

Petitioners' Reply Brief argues for the first time that even once it became clear that individualized distribution of funds allocated to the Looted Assets class was impracticable, the District Court's exercise of *cy pres* authority to distribute funds for the relief of needy members of the class was unlawful Petitioners' Reply Brief, at 4-6.

As the Second Circuit decision below makes clear, however, while petitioners have challenged the allocation formula pursuant to which the *cy pres* distribution to the needy was carried out, until now, petitioners have supported the District Court's authority to commit Looted Assets class funds for the relief of needy Holocaust survivors. The Second Circuit below accurately summarized HSF's appellate position, as follows:

> ...the HSF asserts that *needy* Holocaust survivors residing in the United States have received a disproportionately small allocation, relative to the *needy* survivors residing in the former Soviet Union.

In re Holocaust Victim Assets Litig, 424 F.3d 132 (2nd Cir 2005)(emphasis added).

Petitioners' brief to the Second Circuit below began with the following statement:

> The members of the class which appellants seek to benefit are *needy* Holocaust survivors, most of whom

> are between the 75 and 85 years of age, for whom ultimate relief would be meaningless without expeditious payment of available funds *for their benefit*. (emphasis added.)

Initial Brief of Appellants "GK" et al, in 04-1898(L), at viii, n.1

Petitioners' September 10, 2003 challenge to the District Court's Looted Assets allocation ruling explicitly urged that the funds be allocated to the needy "*to meet the human services needs of Class members who are currently being underserved*.....Motion for Immediate Interim Distibution of Swiss Settlement Proceeds, September 10, 2003, p.1. (reproduced in the Joint Appendix in the court below as JA 6869).

Petitioners' September 10, 2003 motion stated that funds distributed to survivors residing in the United States would be placed in a trust, and that "*the use of such funds would be guided by an assessment of current need, and the likelihood and timing of funds from other sources*.... *Id* at p. 1, n. 1.

Petitioners' January 30, 2004 submission to the District Court is denominated as a "Plan For Providing Assistance For *Needy* Nazi Victims in the United States.... (reproduced in the Joint Appendix below as JA 7589-7606)(emphasis added).

Finally, on April 29, 2004, in the course of a hearing in the District Court on potential *cy pres* distributions, the following colloquy ensued between the District Court and Mr. Dubbin, counsel of record herein:

THE COURT: Do you propose to give money to every member of the looted assets class?

MR. DUBBIN: We propose...

THE COURT: That can be answered yes or no.

MR. DUBBIN: No, sir, we do not.

THE COURT: No.

MR DUBBIN: But...

THE COURT: And so the people who you're not giving money to, they will have gotten under your theory, no consideration for their release.

MR DUBBIN: Your Honor?

THE COURT: Isn't that true?

MR. DUBBIN: No, people have a responsibility to stand up and express their position with regard to a case which they're a part of. My clients have done that. They are class members. They have objected. *They have objected to the fact that members of the looted assets class who have needs who live in this country have gotten no benefit from [sic]. That's our position. And that's what the appellate court is going to decide.* Transcript of Proceedings, April 29, 2004 at pp. 272-73.

In fact, the extreme position asserted in the Reply Brief appears to mis-state the position of the leadership of

the HSF, which has consistently urged the District Court to allocate Looted Assets funds for the relief of needy survivors, albeit pursuant to a "national residence quota" formula that would benefit needy survivors residing in the United States. See, eg., Letter, dated January 30, 2004, to District Court from Holocaust Survivors Foundation Board of Directors (urging distribution of Looted Assets funds for the benefit of needy survivors residing in the United States) (reproduced in the Joint Appendix below as JA 7450-7454). Indeed, Mr. Dubbin and the petitioners herein sought and obtained precisely such a *cy pres* distribution solely to the needy in connection with the distribution of the $25.5 million Hungarian Gold Train settlement. See *Rosner v. United States of America*, Case No. 01-1849- CIV- SEITZ, S.D. Fla., Final Order and Judgment (September 25, 2005).

In short, the suggestion in Petitioners' May 31, 2006 Reply Brief that petitioners have consistently opposed the use of the *cy pres* doctrine to provide assistance to needy Holocaust survivors is nothing less than an effort to re-write history.

II.

PETITIONERS' BELATED EFFORT TO CHALLENGE THE DISTRICT COURT'S AUTHORITY UNDER THE *CY PRES* DOCTRINE TO DISTRIBUTE LOOTED ASSETS FUNDS FOR THE RELIEF OF NEEDY HOLOCAUST SURVIVORS IS PRECLUDED BY AN EXPLICIT DECISION OF THE SECOND CIRCUIT

Petitioners' belated effort to challenge the District Court's power under the *cy pres* doctrine to allocate Looted Assets funds for the relief of needy class members is

precluded by the Second Circuit's earlier decision in *In re Holocaust Victim Assets Litig*, 413 F.3d 183 (2nd Cir. 2001) (reproduced as Appendix D to the Petition in 05-1275).

In November, 2000, after the District Court had reluctantly determined that it was impracticable to distribute Looted Assets funds on an individualized basis, the District Court directed that Looted Assets funds be distributed for the relief of needy members of the class under the *cy pres* doctrine. *In re Holocaust Victim Assets Litig*, 2000 WL 33241660 (EDNY November 22, 2000) (reproduced as Appendix C to the Petition in 05-1275). A member of the Looted Assets class objected, arguing that the District Court lacked power to distribute settlement funds for the relief of needy class members. After a timely *pro se* appeal was lodged with the Second Circuit, the Circuit appointed counsel for the objector, and the issue was fully briefed and argued before the Circuit. On July 26, 2001, the Second Circuit explicitly found that the challenge to the *cy pres* distribution "lacks legal merit," and affirmed the District Court's allocation of $100 million for the relief of needy Looted Assets class members. 413 F.3d at 186; (App D at D-5).

Petitioners consciously chose not to prosecute their appeal raising similar issues. See Appendix J to the Brief in Opposition in 05-1275 (withdrawal of petitioners' appeal). Nor did petitioners seek certiorari from the Second Circuit's ruling. Accordingly, they are precluded from seeking to raise the issue belatedly almost five years after the rejection of their position by the Second Circuit.

Conclusion

For the above-stated reasons, the petition for certiorari should be denied.

Dated: June 6, 2006
New York, New York

Respectfully submitted

Burt Neuborne
40 Washington Square South
New York, New York 10012
Lead Settlement Counsel
(212) 998-6172